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United States

1138

Circuit Court of Appeals

For the Ninth Circuit.

LOST HILLS MINING COMPANY, a Corpora-
tion, and UNIVERSAL OIL COMPANY,
a Corporation,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
Southern District of California, Northern Division.

FILED

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*In the District Court of the United States, for the
Southern District of California, Northern Divi-
sion, Ninth Circuit.*

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants.

Citation on Appeal.

The United States of America,—ss.

To the United States of America, GREETING:

YOU ARE HEREBY CITED and admonished to be and appear at the United States Circuit Court of Appeals, Ninth Circuit of the United States, to be holden at San Francisco, California, on the 18 day of February, 1917, pursuant to an appeal filed in the Clerk's office of the United States District Court in and for the Southern District of California, Northern Division, Ninth Circuit, wherein the Lost Hills Mining Company, a corporation, and the Universal Oil Company, a corporation, are appellants and the United States of America is respondent to show cause, if any there be, why the order and decree appointing Howard M. Payne receiver of the properties involved in the above-entitled suit should not be corrected and speedy justice should not be done to the parties on that behalf.

WITNESS the Honorable MAURICE T. DOOLING, Judge of said District Court this 19 day of January, in the year of our Lord one thousand nine hundred and seventeen and of the independence of the United States of America one hundred and forty-first.

M. T. DOOLING,
District Judge. [4*]

Due service of the within citation is hereby admitted and acknowledged on behalf of the United States this 19th day of January, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,
FRANK HALL,
Special Assistants to the Attorney General,
Attorneys for Appellees.

[Endorsed]: In Equity—A-57-Eq. In the District Court of the United States for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Lost Hills Mining Company and Universal Oil Company, Defendants. Citation on Appeal. Filed Jan. 23, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. [5]

*Page-number appearing at foot of page of original certified Transcript of Record.

Names and Addresses of Attorneys.

For Appellants:

JOSEPH D. REDDING, Esq., and Messrs.
MORRISON, DUNNE AND BROBECK,
Crocker Building, San Francisco, Cali-
fornia.

For Appellees:

ROBERT O'CONNOR, Esq., United States
Attorney, Los Angeles, California;
HENRY F. MAY, Esq., and FRANK
HALL, Esq., Special Assistants to the
Attorney General, San Francisco, Cali-
fornia. [6]

*In the District Court of the United States of Amer-
ica, in and for the Southern District of Cali-
fornia, Northern Division.*

IN EQUITY—No. A-57.

THE UNITED STATES OF AMERICA,

Complainants,

vs.

LOST HILLS MINING COMPANY, a Corpora-
tion, and the UNIVERSAL OIL COM-
PANY, a Corporation,

Defendants. [7]

*In the District Court of the United States for the
Southern District of California, Northern Divi-
sion, Ninth Circuit.*

IN EQUITY—No. —

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,
Defendants.

Bill of Complaint.

To the Judges of the District Court of the United
States for the Southern District of California,
Sitting Within and for the Northern Division of
Said District:

The United States of America, by Thomas W.
Gregory, its attorney general, presents this, its Bill
in Equity, against Lost Hills Mining Company and
Universal Oil Company, the above-named defend-
ants (citizens and residents, respectively, as stated
in the next succeeding paragraph of this Bill), and
for cause of its Complaint alleges:

I.

That each of said defendants now is, and at all
times hereinafter mentioned as to it was, a corpora-
tion organized and existing under the laws of the
State of California.

II.

That on and before the 27th day of September,

1909, the following described lands, to wit:

The Southwest Quarter (SW. $\frac{1}{4}$) of Section eighteen (18) in Township twenty-six (26) South, Range twenty-one (21) East, Mount Diablo Meridian,— [8]

were a part of the public lands of the United States, and as such, the plaintiff was on that date, has ever since been, and now is, the owner and entitled to the possession thereof, and of all oil, petroleum, gas and other minerals therein contained.

III.

On the 27th day of September, 1909, the President of the United States, acting by and through the Secretary of the Interior, and under the authority legally invested in him so to do, duly and regularly withdrew and reserved all of the land hereinbefore particularly described (together with other lands) from mineral exploration, and from all forms of location or settlement, selection, filing, entry, patent, occupation or disposal, under the mineral and non-mineral land laws of the United States, and since said last-named date, none of said lands have been subject to exploration for mineral oil, petroleum or gas, occupation, or the institution of any right under the public land laws of the United States.

IV.

Notwithstanding the premises, and in violation of the proprietary and other rights of this plaintiff, and in violation of the laws of the United States and lawful orders and proclamations of the President of the United States, and particularly in violation of said order of withdrawal of September 27th, 1909,

mentioned in the preceding paragraph, and in disregard of, contrary to and by infringement upon, the general governmental policy adopted by the United States for the protection, conservation, disposal and use of the petroleum and gas contained in said lands and in other lands belonging to the United States, the defendants, Lost Hills Mining Company and Universal Oil Company, entered upon and took possession of the lands hereinbefore particularly described, long subsequent to the 27th day of September, 1909, but not prior thereto, for the purpose of prospecting and exploring for petroleum [9] and gas therein, and did so prospect and explore long subsequent to the date on which said lands were withdrawn, as hereinbefore mentioned, by said Withdrawal Order of September 27th, 1909.

V.

Neither of the defendants herein had discovered petroleum, gas or other minerals on said lands on or before said lands were withdrawn, as hereinbefore stated, by the Withdrawal Order made on the 27th day of September, 1909, as hereinbefore set forth.

VI.

Neither of the defendants, nor any person for them or under whom they claim, was, at the date of said order of withdrawal of September 27th, 1909, a *bona fide* occupant or claimant of said land and in the diligent prosecution of work leading to the discovery of oil or gas; and neither of the defendants after the dates of the respective entering upon said land, as hereinbefore alleged, and after beginning the prosecution of the work of drilling for oil and

gas, in violation of the order of withdrawal of September 27th, 1909, continuously and diligently prosecuted said work till oil or gas was discovered.

VII.

Long after the lands hereinbefore described had been withdrawn from prospecting, exploration and entry, as hereinbefore set forth, by the order of September 27th, 1909, hereinbefore mentioned, to wit; in the spring of 1911, and not before that date, as plaintiff is informed and believes, the defendant, Lost Hills Mining Company or the defendant, Universal Oil Company, discovered petroleum on said land, and long after the 27th day of September, 1909, said defendants drilled an oil well thereon for the extraction and production of petroleum therefrom, and have in violation of the proprietary and other rights of the plaintiff herein, and in violation of the laws of the United States [10] and of proclamations and orders issued by the President of the United States, and particularly in violation of said order of Withdrawal of September 27th, 1909, and in disregard of, and contrary to, and by infringement upon, the general governmental policy adopted and declared by the United States for the protection, conservation, use and disposal of petroleum and gas in said lands and in other lands belonging to the United States, and to the great and irremediable damage to the plaintiff, and to the great and irreparable injury to the lands hereinbefore described, and to other lands adjacent thereto and belonging to the United States, extracted and produced on the land hereinbefore described large quantities of petro-

leum and gas, but the exact amount and value of the petroleum and gas so extracted and produced, the plaintiff is unable to state.

VIII.

Of the petroleum and gas extracted and produced in the manner set forth in the preceding paragraph of this bill, large quantities have been converted, used and consumed by the said defendants, but as to the exact quantities of petroleum and gas so produced, converted, used and consumed, this plaintiff is here unable to state because it has no knowledge thereof and has no means of ascertaining the facts in relation thereto except from the defendants herein, and therefore a full discovery from said defendants is sought herein.

IX.

Said defendants are now trespassing upon said lands and asserting claims thereto, and are now threatening to, and will, unless restrained by the order of this Court, continue to unlawfully extract oil and gas from said lands, and to drill oil and gas wells thereon, and operate same, and extract, convert and appropriate, use, sell and dispose of oil and gas from said lands, and otherwise trespass upon said lands and commit [11] waste thereon to the great and irremediable damage of plaintiff, and to the great and irreparable injury and damage to said lands, and to other lands adjacent thereto and belonging to the United States, and contrary to, and by infringement upon, the general governmental policy adopted and declared by the United States for the protection and conservation, use, and disposal, of the petroleum

and gas in said lands and in other lands belonging to the United States, and in violation of the laws of the United States and of proclamations and orders issued by the President of the United States, and particularly in violation of said order of September 27th, 1909.

X.

Each of the defendants herein claim some right, title or interest to said land or some part thereof, or in the petroleum or gas extracted therefrom, and each of said claims is predicated upon, or derived directly or mediately from, some pretended locations, and notice or notices of mining locations, or otherwise, and by conveyance, contracts, or liens directly or mediately from the persons by whom such pretended locations are claimed to have been made. But none of such locations or notices of locations and claims is valid against this plaintiff and no rights have accrued to the defendants or either of them thereunder, either directly or mediately; nor have any minerals been discovered on said land except as hereinbefore stated; but said claims are asserted to cast a cloud upon the title of the plaintiff herein and wrongfully interfere with its operation and disposition of said land, to the great and irremediable damage of said plaintiff and to the great and irreparable injury of said land and other lands adjacent thereto and belonging to the United States; and the plaintiff herein is without redress or adequate remedy save by this suit, and this suit is necessary to avoid a multiplicity of actions. [12]

XI.

Except as in this bill stated, the plaintiff has no other knowledge or information concerning the nature of any other claims asserted by the defendants herein, or either of them, and therefore leaves said defendants to set forth their respective claims and interests.

In that behalf, plaintiff alleges, because of the premises of this bill, that neither of the defendants has or ever had any right, title or interest in or to, or any lien upon, said land or any part thereof, or any right, title or interest in or to the petroleum, mineral, oil or gas deposited therein, or any right to extract petroleum, gas or other minerals from said land, or to convert or dispose of the petroleum or gas so extracted or any part thereof; on the contrary, the acts of these defendants who have entered upon said lands and drilled an oil and gas well thereon and used and appropriated the petroleum deposited therein, were all in violation of the laws of the United States and of the aforesaid order of withdrawal, and all of said acts are in violation of the rights of the plaintiff herein, and such acts interfere with the execution by the plaintiff of its public policies with respect to said lands and the petroleum and gas therein, as hereinbefore set forth.

XII.

The present value of the lands hereinbefore described exceed Five Hundred Thousand Dollars (\$500,000.00).

In consideration of the premises thus exhibited, and inasmuch as plaintiff herein is without full and

adequate remedy in the premises save in a court of equity, where matters of this nature are properly cognizable and relievable, PLAINTIFF PRAYS:

1. That said defendants, and each of them, may be required to make full, true and direct answer respectively to all [13] and singular the matters and things hereinbefore stated and charged, and to fully disclose and state their claims to said land hereinbefore described, and to any and all parts thereof, as fully and particularly as if they had been particularly interrogated thereunto, but not under oath, answer under oath being hereby expressly waived.

2. That the said land may be declared by this Court to have been at all times from and after the 27th day of September, 1909, lawfully withdrawn from mineral exploration and from all forms of location, settlement, selection, filing, entry or disposal under the mineral and nonmineral Public Land Laws of the United States.

3. That said defendants, and each of them, may be adjudged and decreed to have no estate, right, title, interest or claim in or to said land or any part thereof, or in or to any mineral or minerals or mineral deposits contained in or under said land or any part thereof; and that all and singular of said land, together with all of the minerals and mineral deposits, including mineral oil, petroleum and gas therein or thereunder contained, may be adjudged and decreed to be the perfect property of this plaintiff, free and clear of the claims of said defendants and each of them.

4. That each of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually, may be enjoined from asserting or claiming any right, title, interest, claim or lien in or to the said land or any part thereof, or in or to any of the minerals or mineral deposits therein or thereunder contained; and that each of the defendants herein, their officers, agents, servants and attorneys, during the progress of this suit, and thereafter, finally and perpetually, may be enjoined from going upon any part or portion of said land, and from in any manner using any of said land and premises, and from in any manner [14] extracting, removing or using any of the minerals deposited in or under said land and premises, or any part or portion thereof, or any of the other natural products thereof, and from in any manner committing any trespass or waste upon any of said land or with reference to any of the minerals deposited therein or thereunder, or any of the other natural products thereof.

5. That an accounting may be had by said defendants, and each of them, wherein said defendants, and each of them, shall make a full, complete, itemized and correct disclosure of the quantity of minerals (and particularly petroleum) removed or extracted, or received by them or either of them, from said land, or any part thereof, and of all rents and profits received under any sale, lease, transfer, conveyance, contract, or agreement concerning said land or any part thereof; and that the plaintiff may recover from said defendants, respectively, all damages

sustained by the plaintiff in these premises.

6. That a receiver may be appointed by this Court to take possession of said land and of all wells, derricks, drills, pumps, storage vats, pipes, pipe-lines, shops, houses, machinery, tools and appliances of every character whatsoever thereon, belonging to or in the possession of said defendants, or either of them, which have been used or now are being used in the extraction, storage, transportation, refining, sale, manufacture, or in any other manner, in the production of petroleum or petroleum products or other minerals from said land or any part thereof for the purpose of continuing, and with full power and authority to continue the operations on said land in the production and sale of petroleum and other minerals where such course is necessary to protect the property of the complainant against injury and waste, and for the preservation, protection, and use of the oil and gas in said land, and the wells, derricks, pumps, tanks, storage vats, [15] pipes, pipe-lines, houses, shops, tools, machinery and appliances being used by the defendants, their officers, agents or assigns, in the production, transportation, manufacture or sale of petroleum or other minerals from said land or any part thereof, and that such receiver may have the usual and general powers vested in receivers of Courts of Chancery.

To the end, therefore, that this plaintiff may obtain the relief to which it is justly entitled in the premises, may it please your Honors to grant unto the plaintiff a writ or writs of subpoena, issued by and under the seal of this Honorable Court, directed

to said defendants herein, to wit: Lost Hills Mining Company and Universal Oil Company, therein and thereby commanding them and each of them at a certain time, and under a certain penalty therein to be named, to be and appear before this Honorable Court, and then and there, severally, full, true and direct answers make to all and singular the premises, but not under oath, answer under oath being hereby expressly waived, and stand to perform and abide by such order, direction and decree as may be made against them, or either of them, in the premises, and shall be meet and agreeable to equity.

THOMAS W. GREGORY,

Attorney General of the United States.

ALBERT SCHOONOVER,

United States District Attorney.

E. J. JUSTICE,

Special Assistant to the Attorney General.

A. E. CAMPBELL,

Special Assistant to the Attorney General.

FRANK HALL,

Special Assistant to the Attorney General.

[16]

United States of America,
Northern District of California,
State of California,—ss.

George Hayworth, being first duly sworn, deposes and says:

He is now and has been since the 1st day of February, 1914, Chief of Field Division of the General Land Office at San Francisco, California, and prior to that time was, since July, 1910, a Special Agent of

the General Land Office doing field work in California, and much of said work has been done in the investigation of facts relating to the lands withdrawn by the President as oil lands, and especially the lands withdrawn by order of September the 27th, 1909, and by the order of July 2d, 1910.

That from examination of such lands, or the facts in relation thereto obtained by him or by Special Agents acting under his direction as such Chief of Field Division, and from examinations of the records of the General Land Office, and the local land offices of complainant in said State of California, he is informed as to the matters and things as stated in the complaint with reference to the particular lands therein described; and the matters therein stated are true, except as to such matters as are stated to be on information and belief, and as to these, affiant, after investigation, states he believes them to be true.

GEO. HAYWORTH.

Subscribed and sworn to before me this 13th day of June, 1916.

[Seal]

T. L. BALDWIN,
Deputy Clerk, U. S. District Court, Northern District of California. [17]

[Endorsed]: No. A-57—Eq. In the District Court of the United States for the Southern District of California, United States of America, Plaintiff, vs. Lost Hills Mining Company et al. Bill of Complaint. Filed Jun. 15, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. E. J. Justice, Attorney for Plaintiff. [18]

*In the District Court of the United States, for the
Southern District of California, Northern Divi-
sion, Ninth Circuit.*

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants.

Answer of Defendants.

Now comes the Lost Hills Mining Company and the Universal Oil Company, the defendants in the above-entitled action, and answering the bill of complaint of the plaintiff herein, admit, allege and deny as follows:

I.

Answering paragraph II of the bill of complaint on file herein, said defendants deny that on or before the 27th day of September, 1909, the lands described in plaintiff's bill of complaint were a part of the public lands of the United States, and deny that as such, plaintiff was, on that date, and ever since has been, and now is, or was on that date, or has ever since been, or now is, the owner and entitled to possession thereof, or the owner or entitled to the possession thereof and of all oil, petroleum, gas and other minerals therein contained, or of all or any oil or petroleum or gas or oil minerals or mineral therein contained; and in this behalf the said defendants allege

that the lands described in said bill of complaint were duly located and entered upon and taken possession of by the said defendants, and [19] their assignors, and predecessors in interest, on the 13th day of February, 1907; that the said defendants furthermore allege that ever since the last-named date, the said defendants and their assignors and predecessors in interest have been in possession of said land and have been and now are entitled to the possession of said lands and to the possession of the oil, petroleum, gas and all other minerals contained therein, and now are the owners and entitled to the possession thereof, and of all oil, petroleum, gas and other minerals therein contained.

Further answering paragraph II of said bill of complaint, said defendants admit that the plaintiff holds the legal title to the property referred to and described in paragraph II of said bill of complaint, but deny that the plaintiff is entitled to the possession of said lands, or any part thereof, or to the possession of the oil, or petroleum, or gas, or all other minerals or to the possession of any mineral contained in said lands, and in this behalf said defendants allege that they are, and they and their assignors and predecessors in interest, ever since said 13th day of February, 1907, have been, entitled to the possession of said lands described in said paragraph II and to the possession of the oil, petroleum, gas and all other minerals therein contained, and the said defendants furthermore allege that they are the equitable owners of said lands and are entitled to the execution and issuance by the plaintiff of a patent

to them, the said defendants, conveying to them the legal title to said lands and to all the minerals contained therein.

II.

Answering paragraph III of said bill of complaint said defendants admit that on the 27th day of September, 1909, the President of the United States withdrew and reserved certain land [20] from mineral exploration and from all forms of location, settlement, selection, filing, entry, patent, occupation or disposal under the mineral and nonmineral land laws of the United States, but deny that by said order the lands described in paragraph II of said bill of complaint, which said lands, as heretofore alleged, are in the lawful possession of these defendants, were in any manner affected, or that the rights of these defendants, or either of them, in or to said lands, were in any manner affected thereby, and deny that on the 27th day of September, 1909, the President of the United States, acting by and through the Secretary of the Interior, and under the authority legally information and belief, and as to these, affiant, after vested in him so to do, or by any other authority, or at all, duly and regularly, or duly or regularly, withdrew and reserved, or withdrew or reserved, all of the lands described in plaintiff's bill of complaint, or any of them, together with other lands, or single or by themselves, from mineral exploration, or from any other kind of exploration, and from, or from, all, or any forms of location, or settlement, or selection, or filing, or entry, or patent, or occupation, or disposal, under the mineral or nonmineral land

laws of the United States, and defendants deny that since said last-named date, to wit, said 27th day of September, 1909, none of said lands described in plaintiff's bill of complaint have been subject to exploration for mineral oil or petroleum, or gas, or occupation, or the institution of any right under the public land laws of the United States, and in this behalf these defendants allege that in and by the terms of said order of withdrawal, it was provided that all locations or claims existing and valid on the date of said withdrawal, to wit, on said 27th day of September, 1909, might proceed to entry in the usual manner after field investigation and examination, and that [21] the lands described in paragraph II of said bill of complaint, at all times since said 13th day of February, 1907, have been and now are valid locations and claims within the meaning, purport and effect of the said proviso to the said withdrawal order.

III.

Answering paragraph IV of said bill of complaint, said defendants deny that in violation of the propriety and other rights of the plaintiff, and in violation of the laws of the United States and the lawful orders and proclamations of the President of the United States, and particularly in violation of said order of withdrawal of September 27th, 1909, mentioned in paragraph III of said bill of complaint, and in disregard of, and contrary to, and by infringement upon the general governmental policy adopted by the United States for the protection, conservation, disposal and use of the petroleum and gas contained in said lands, and in other lands belonging to

the United States, or in violation of the proprietary or other rights of the plaintiff, or in violation of the laws, or any law, of the United States, or lawful orders, or any orders, or proclamations, or proclamation, of the President of the United States, or particularly in violation of said order of withdrawal of September 27th, 1909, mentioned in paragraph III of plaintiff's bill of complaint, or any other order of withdrawal, or in disregard of, or contrary to, or by infringement upon, the general, or any, governmental policy adopted by the United States for the protection, or conservation, or disposal, or use, or any other purpose, of the petroleum, or gas, contained in said lands, or in any other lands, or land, belonging to the United States, said defendants, Lost Hills Mining Company and Universal Oil Company, or either of them, or anyone in their behalf, or their assignors, or predecessors in interest, [22] entered upon and took possession, or entered upon, or took possession, of said lands, particularly described in plaintiff's bill of complaint, or any part thereof, long, or at all, subsequent to the 27th day of September, 1909, for the purpose of prospecting and exploring, or prospecting or exploring said lands for petroleum and gas, or petroleum, or gas therein, or for any other purpose, and in this behalf said defendants allege that they, and their assignors and predecessors in interest, have been in the lawful possession of said lands since said 13th day of February, 1907, and did, on said 13th day of February, 1907, enter into possession, and have continuously ever since, held possession thereof, and have at all times since, prospected and explored said lands for petroleum and gas there-

in, long prior to the date of said withdrawal, to wit, said 27th day of September, 1909, and have at all times diligently prosecuted, and were on said date, in the diligent prosecution of work leading to the discovery of oil and gas upon said land and have continued in the diligent prosecution of said work until oil, petroleum and *has* were discovered upon said land in commercial quantities.

IV.

Answering paragraph V of said bill of complaint, said defendants admit that these defendants had not discovered petroleum or gas on said lands on or before said 27th day of September, 1909; but deny that said defendants, and their predecessors, had not discovered other minerals on said lands on or before the said date; and deny that they and their predecessors had acquired no right on or with respect to said lands on or prior to said date, and in this behalf the said defendants allege that their assignors and predecessors in interest, through whom these defendants deraigned their title, were, long prior to said order of withdrawal [23] of September 27, 1909, to wit, as early as December, 1908, continuously and diligently engaged in exploring and developing said lands for gas and petroleum and in the building of roads upon said lands, and upon adjacent lands leading to said lands, and in the maintenance of said roads, and in the construction, building, and erection of buildings upon said lands, and in the digging and construction of foundation trenches upon said lands, for the establishment of drilling rigs thereon, and in the purchase and bringing in upon said lands of rig timbers, and in the establishment of an equip-

ment plant upon said lands and upon adjacent lands for the development of oil, gas and petroleum upon said lands, and to be used in connection therewith, and in the transportation of water in and upon said lands, and in the establishment of a conduit system for water from adjacent lands onto said lands; that all of said last-enumerated development work and industry on the part of the said defendants and their assignors and predecessors in interest, continued from the month of December, 1908, throughout all of the years 1909, 1910 and 1911, and down to the present date. Defendants furthermore allege that they, and their assignors and predecessors in interest, continued to use uninterruptedly and continuously, said roads, said water conduits, said buildings, said rig timbers, said foundation trenches, and did establish their rights therein and thereon, and are doing so at the present time. That said defendants and their assignors and predecessors in interest have been in daily and actual possession and occupation of said lands from the year 1907 down to and including the present time, without interruption, and always with the continuous diligent industry and effort to discover oil, gas and petroleum upon said lands, and have, as a result of said continuous, uninterrupted and diligent industry [24] and effort, discovered and are producing oil, gas and petroleum in paying quantities upon said lands. Furthermore said defendants allege that they and their assignors and predecessors in interest, through whom these defendants deraigned their title, discovered a mineral, to wit, gypsum, on said lands, long before the 27th day of September, 1909, to wit, during the month of

December, 1908, and that by virtue of said discovery, and by virtue of the due posting and recording of a valid location notice, and by virtue of the performance of the annual assessment work and labor upon said lands, required by statute, and the due performance by them and their assignors and predecessors in interest of all of the requirements of the laws relating thereto, and by the continuous possession, occupation and industry looking toward and leading to the discovery of oil, gas and petroleum upon said lands, these defendants have acquired rights on and with respect to said lands, which said rights could not lawfully be and were not impaired by said withdrawal order of the 27th day of September, 1909, or by any subsequent withdrawal order.

V.

Answering paragraph VI of said bill of complaint, said defendants deny that said defendants, or any person for them, or under whom they claim, were not, at the date of said order of withdrawal of September 27th, 1909, *bona fide* occupants or claimants of said lands, or in the diligent prosecution of work leading to the discovery of oil or gas; on the contrary, these defendants allege that the defendant Lost Hills Mining Company was, at the date of said order of withdrawal, to wit, said 27th day of September, 1909, a *bona fide* occupant and claimant of said lands, and was in the diligent prosecution of work leading to the discovery of oil and gas, and in this behalf these defendants allege [25] that commencing with the month of February, 1907, and thence on during the years 1908 and 1909, the defendants, and their assignors and predecessors in inter-

est, from whom these defendants deraigned their title, were in the actual occupation of said lands, and were diligently and continuously industrious in developing said lands for gas, oil and petroleum. And in support of said last allegation, these defendants reiterate and refer to all of the allegations made by them in paragraph IV of this answer, and repeat the same. Furthermore these defendants deny that neither of these defendants, after the date of the respective entering upon said lands, or after beginning the prosecution of the work of drilling for oil and gas, or oil, or *has*, or in violation of the order of withdrawal of September 27th, 1909, continuously and diligently or continuously, or diligently, prosecuted said work till oil or gas was discovered. On the contrary, these defendants allege that they, and their assignors and predecessors in interest, through whom these defendants deraigned their title, did, from and after the date of entering upon said lands, to wit, from and after the said 13th day of February, 1907, continue in the diligent prosecution of said work till oil and gas were discovered. Defendants further allege that they, and their assignors and predecessors in interest, through whom these defendants deraigned their title, never prosecuted the work of drilling for oil and gas, or any mineral, in violation of the order of withdrawal of September 27th, 1909, or in violation of any order of withdrawal.

VI.

Answering paragraph VII of said bill of complaint, said defendants deny that long after the said lands had been withdrawn from prospecting, ex-

ploration or entry by the order of September [26] 27th, 1909, or at any time after the said lands had been withdrawn from prospecting, exploration or entry, or at any time after said lands had been withdrawn by the order of September 27th, 1909, or at any time after said lands had been withdrawn by any order, or at all, or in the spring of 1911, and not before that date, said Lost Hills Mining Company and said Universal Oil Company discovered petroleum on said land. On the contrary, said defendants allege that said lands never have been withdrawn from prospecting, exploration or entry, and never were, or have been, or are, withdrawn or affected at all by the order of September 27th, 1909, or by any order of the United States or any officer or department thereof. And said defendants furthermore allege that they, and their predecessors in interest, discovered petroleum, gas and other minerals on said land long before the 1st day of January, 1911, and acquired the possession, ownership and right to oil, petroleum and gas, and all other mineral on said lands at a time when the same were open for location, occupation and development as mineral lands under the mineral laws of the United States and in conformity thereto and therewith, and under the privileges and rights guaranteed to said defendants so to do by the laws of the United States. The said defendants admit that between the date of February 13th, 1907, and the present time, the defendants herein have discovered petroleum on said lands and have drilled numerous wells thereon, and have continued the drilling of numerous wells

thereon for the extraction of petroleum therefrom; but said defendants deny that they, or either of them, or their assignors, or their predecessors in interest, have, in violation of the laws of the United States, and of the proclamations and order issued by the President of the United States, and particularly in violation of said order of withdrawal of September [27] 27th, 1909, and in disregard of, and contrary to, and by infringement upon the general governmental policy adopted and declared by the United States for the protection, conservation, use and disposal of petroleum and gas in said lands, and in other lands belonging to the United States, and to the great and irremediable damage to plaintiff and to the great and irreparable injury to the lands described in plaintiff's bill of complaint, and to other lands adjacent thereto and belonging to the United States, or in violation of the laws, or any law, of the United States, or of the proclamations and order, or proclamations, or proclamation, or orders, or order, issued by the President of the United States, or particularly, or otherwise, in violation of said order of withdrawal of September 27th, 1909, or in disregard of, or contrary to, or by infringement upon, the general, or any governmental policy adopted and declared, or adopted, or declared, by the United States, for the protection, or conservation, or use, or disposal of petroleum, or gas, in said lands, or in other lands belonging to the United States, or the great, or irremediable, or any damage to the plaintiff, or to the great, or irreparable, or any injury to the lands, or any land, described in said bill

of complaint, or to other lands, or any lands, or land, adjacent, or otherwise, thereto, or belonging to the United States, extracted and produced, or extracted, or produced, on the land described in said bill of complaint, large or any quantities of petroleum and gas. Said defendants admit that they, and their assignors, and predecessors in interest, had not discovered petroleum or gas on said lands on or before the 27th day of September, 1909, and in this behalf said defendants allege that the said lands had not been withdrawn and were not withdrawn from prospecting, exploration and entry by the said order of September, 1909, and said [28] defendants allege that the said lands were not included and within the said land named in said last-named order of withdrawal, or in any order of withdrawal. Said defendants deny that the said defendants had not discovered oil or petroleum on said lands prior to the spring of 1911, and in this behalf said defendants allege that they, and their assignors, and predecessors in interest, acquired rights with respect to said lands long prior to the said 27th day of September, 1909, and had discovered a mineral, to wit, gypsum, on said lands long prior to said 27th day of September, 1909, to wit, in the year 1908. Said defendants further allege that the said defendant, Lost Hills Mining Company, discovered and developed oil and petroleum on said lands prior to the 1st day of January, 1911, and that for a long time prior to said discovery, and in fact from the month of December, 1908, and thence continuously, the said defendants, and their assignors, and their

predecessors in interest, through whom the de-raigned title, had been, and were in the actual possession, and continuously and diligently working upon and developing said lands previous to the discovery of oil, gas and petroleum thereon. Defendants furthermore allege that as a result of their actual possession and the possession of their assignors and predecessors in interest from and after said date of February 13th, 1907, down to and including the present date, and as the result of their continuous and industrious working upon and development of said lands, they have discovered and developed oil, petroleum, gas, gypsum and other minerals in paying quantities upon said land, and all in conformity with the laws, statutes and privileges granted to *bona fide* locators by the United States, the plaintiff herein.

VII.

Answering paragraph VIII of said bill of complaint, said [29] defendants admit the allegations contained in said paragraph, but deny that the plaintiff has any right to a full or any recovery from said defendant, or either of them, of the amount of oil, petroleum, gas and other minerals developed, consumed, sold, produced, extracted and taken by said defendants out of or from said lands, and this defendant denies that defendants, or either of them, have converted any quantities or quantity of petroleum and gas, or petroleum or gas, extracted and produced, or extracted or produced on or from said land.

VIII.

Answering paragraph IX of said bill of complaint, said defendants deny that said defendants, or either of them, are now, or at any time have been, trespassing upon said lands, or land, described in plaintiff's bill of complaint, and said defendants deny that they are now threatening to and will, unless restrained by order of this Court, continue to unlawfully extract oil and gas, or oil, or gas, from said lands, and in this behalf defendants allege that their extraction of oil and gas from said lands is not unlawful; said defendants deny that they, or either of them, will continue to convert oil and gas, or oil, or gas, from said lands, or otherwise trespass upon said lands, or commit waste thereon, to the great and irremediable or any damage to the plaintiff, or to the great and irreparable or great, or irreparable injury and damage, or injury, or damage, to said lands described in plaintiff's bill of complaint, and to other lands, or to other land, adjacent thereto and belonging or belonging to the United States, and contrary to, and by infringement upon, or contrary to, or by infringement upon, the general or any governmental policy adopted and declared, or adopted, or declared by the United States for the protection, and conservation, use and [30] disposal, of petroleum and gas, or for the protection, or conservation, or use, or disposal of the petroleum or gas in said lands described in said bill of complaint, or in other lands, or land, belonging to the United States, or in violation of the laws of the United States or of proclamations and orders, or

proclamations, or proclamation, or orders, or order, issued by the President of the United States, and particularly in violation of said order of September 27th, 1909, or particularly in violation of said order of September 27th, 1909.

These defendants allege that their extraction of oil and gas and their appropriation, use, selling and disposal thereof does not constitute any trespass upon said lands, or is a commission of any waste thereon, or constitutes any damage whatsoever to the plaintiff or to the lands described in plaintiff's bill of complaint, or any lands, or land, adjacent thereto, belonging to said plaintiff.

IX.

Answering paragraph X of said bill of complaint, said defendants admit that they claim rights, titles and interests in and to said lands described in plaintiff's bill of complaint, and to all thereof, and to the petroleum, gas and other minerals extracted therefrom and to the proceeds arising from the sale thereof. Furthermore said defendants admit that said claims and rights are predicated upon and derived directly from the notices of mining locations and from a mining location of the 13th day of February, 1907, and from the possession, occupation, continuous industry and development of said lands from and after said date; and said defendants deny that said locations are pretended locations, but allege that said locations were made in good faith and were valid and subsisting locations. Said defendants deny that [31] none of such locations or location, or notices, or notice of locations, or loca-

tion, and claims and claim, or claims, or claim, is valid against this plaintiff, and deny that no rights or right have accrued to the defendants, or either of them thereunder, either directly or mediately, and deny that no minerals have been discovered on said land except as stated in said bill of complaint. On the contrary said defendants allege that said location and notice of location and claims of defendants herein are valid against said plaintiff, and that valid rights have accrued to said defendants, and to each of them, by virtue of said location notice and claim, and by virtue of said continuous occupation, industry and development work thereunder; and said defendants deny that such claims or claim, are, or is asserted to cast a cloud upon the title of the plaintiff herein and wrongfully or wrongfully interfere with its operation and disposition, or operation, or disposition, of said lands, or land, to the great and irremediable damage, or great, or irremediable, or any damage of said plaintiff, and to the great and irreparable injury, or to the great or irreparable, or any injury of said land, or other lands or land adjacent thereto, and belonging, or belonging, to the United States, and said defendants deny that plaintiff herein is without redress or adequate remedy save by this suit, and deny that this suit is necessary to avoid a multiplicity of actions, and in this behalf this defendant alleges that the plaintiff is not entitled to any redress or any remedy in this action, or to maintain an action in any court, until the rights of the plaintiff and defendants have been determined by the General Land Office of the United

States and the Secretary of the Interior thereof.

X.

Answering paragraph XI of said bill of complaint, defendants [32] deny that because of the premises of said bill, that neither of the defendants has or ever had any right, or title, or interest, in or to, or any lien, upon said land, or any part thereof, or any right, or title, or interest, in or to the petroleum or mineral oil, or gas deposited therein, or to any right to extract petroleum or gas, or other minerals, or mineral, from said lands, or any part thereof, and in this behalf said defendants allege that they and their assignors, and predecessors in interest, have the right, title and interest, possession and lien upon said lands, and all thereof, and in, upon and to all of the petroleum, gas and other minerals deposited in said lands, and the right to convert and dispose of the same; and said defendants deny that the acts of these defendants, or either of them, or their assignors, or predecessors in interest, who have entered upon said lands, or any part thereof, and drilled, or drilled, an oil and gas, or oil, or gas well thereon, or used, or appropriated the petroleum deposited therein, or any other acts of said defendants, or either of them, or their assignors, or predecessors in interest, were all, or any of them, in violation of the laws, or any law of the United States, and of the aforesaid order of withdrawal, or of the aforesaid order of withdrawal, or of any order of withdrawal, or that all or any of said acts, or act, are or is in violation of the rights, or of any right, of the plaintiff herein; and deny that such acts, or

any act on the part of the said defendants, or either of them, or their assignors, or predecessors in interest, interfere with the execution by the plaintiff of its public or any policies with respect to said lands, or any land, and the petroleum and gas therein, or the petroleum, or gas therein, or any other mineral therein contained, as set forth in the said plaintiff's bill of complaint, or in any wise, or at all. [33]

XI.

By way of a further, separate and affirmative answer and defense to said bill of complaint, these defendants allege that their grantors, assignors and predecessors in interest, through whom they have deraigned title, duly located said lands as a mining claim on the 13th day of February, 1907, while said lands were unoccupied public lands of the United States, open to exploration and location for minerals under the provisions of the Revised Statutes of the United States and before any withdrawal thereof. And said defendants furthermore allege that they, and their assignors, and predecessors in interest, have held possession and worked the said lands described in said bill of complaint of plaintiff, continuously from said last-mentioned date down to the present time; and furthermore allege that they made a valid discovery of mineral, to wit, gypsum, upon said lands in the year 1908. Said defendants furthermore allege that they have continuously occupied said lands from the said date of location, and have continuously and uninterruptedly and industriously worked and developed the same in the development and production of oil, gas and

petroleum. The said defendants furthermore allege that they, and their assignors, and predecessors, have held and worked the said lands described in said bill of complaint, namely, the southwest quarter (SW. $\frac{1}{4}$) of section eighteen (18), township twenty-six (26) south, range twenty-one (21) east, Mount Diablo base and meridian, as a mining claim, for a period equal to the time prescribed by the Statute of Limitations for mining claims of the State of California, in which state the lands are located, to wit, for the period of five years prior to the commencement of this action, without any adverse claim being made in or to said lands, or to any part thereof, and that said defendants, by reason [34] of said fact, are now the true and equitable owners of said lands, and entitled to patent thereto from the Government of the United States under the provisions of section 2322 of the Revised Statutes of the United States.

XII.

And for a further, separate and distinct defense to the cause of action set forth in plaintiff's bill of complaint on file herein, said defendants allege that this Court has no jurisdiction to try and determine the matter set forth in said bill of complaint, or the title to the lands described in said bill of complaint, or the right to the possession of said lands, and particularly the right, title, interest or claim of said defendants in and to said lands, or any part thereof, or their right, title, interest or claim in or to the petroleum, mineral oil or gas deposited therein, or their right to extract petroleum, gas or other minerals from said lands, or their right to convert or

dispose of the petroleum or gas so extracted, or any part thereof, and in this behalf these defendants allege:

XIII.

That the defendant, the Lost Hills Mining Company, was at all the times herein mentioned, and now is, a corporation organized and existing under the laws of the State of California, and authorized and empowered to locate mining claims upon the public lands of the United States under the provisions of Chapter 6, Title 32, of the Revised Statutes of the United States, and that Act of Congress of February 11th, 1897, Chapter 216, entitled "An Act to Authorize the Entry and Patenting of Lands Containing Petroleum and Other Mineral Oils under the Placer Mining Laws of the United States," and all acts amendatory thereof and supplementary thereto, and under the provisions of said Acts of Congress [35] and said laws of the United States, to make application for, and obtain patent therefor, and for any other mining claims which may have theretofore been granted, transferred, conveyed, sold and set over to it.

XIV.

That the following described land, to wit, the southwest quarter (SW. $\frac{1}{4}$) of section eighteen (18), township twenty-six (26) south, range twenty-one (21) east, Mount Diablo base and meridian, the same being the lands described in plaintiff's bill of complaint, were, on the 13th day of February, 1907, and long prior thereto, public lands of the United States, open to location and appropriation under the laws of the United States relating to what are usu-

ally known as "placers" or placer mining ground, and as such were chiefly and only valuable for the petroleum and gypsum therein contained, and ever since said 13th day of February, 1907, continuously down to the present date and to the time of the commencement of this action, the disposition of said lands was and now is under the exclusive jurisdiction and control of the General Land Department of the United States, the Honorable Commissioner of the General Land Office, and the Secretary of the Interior.

XV.

That on the 13th day of February, 1907, W. B. Wallace, J. H. Butts, J. W. McCord, Sarah McCord, John Anderson, C. A. Butts, J. N. Hoyt and O. D. Barton, each and all of whom were then and there citizens of the United States, entered upon and took possession of said southwest quarter (SW. $\frac{1}{4}$) of section eighteen (18), township twenty-six (26) south, range twenty-one (21) east, Mount Diablo base and meridian, and duly located the same as a placer mining claim under the laws of the United States relating to the location of lands usually known as "placers," which said placer [36] mining claim was to be known as the "Lucile Placer Mining Claim," and did duly post thereon, in accordance with the laws relating thereto, a notice of location, and did duly file for record in the office of the County Recorder of the county of Kern, State of California, said notice of location, which said notice of location was duly recorded on the 23d day of February, 1907, at 10 minutes past 9 o'clock A. M., in Book 40 of Mining Records, page 291. That

thereafter, and on or about the 18th day of March, 1909, said locators made, executed and delivered their deed, wherein and whereby they conveyed said southwest quarter (SW. $\frac{1}{4}$) of section eighteen (18), township twenty-six (26) south, range twenty-one (21) east, Mount Diablo base and meridian, to wit, said Lucile Placer Mining Claim, and all their right, title and interest therein, to said defendant, Lost Hills Mining Company, a corporation.

XVI.

That ever since said 13th day of February, 1907, the said land has been in the actual, peaceable, open, notorious, continuous, exclusive and undisputed possession of said defendant, Lost Hills Mining Company, a corporation, and its predecessors in interest, the locators of said Lucile Placer Mining Claim, and that during each year since the said year of 1907, more than One Hundred Dollars (\$100.00) has been expended upon said land in the way of work and improvements thereon and in the development thereof, and that during all of said time said defendants, their assignors and predecessors in interest, have been in the diligent prosecution of work leading to the discovery of oil on said land, and that said work was diligently prosecuted until oil was discovered thereon and a well was drilled, producing petroleum at the rate of at least fifty (50) barrels per day. That said [37] defendant, Lost Hills Mining Company, a corporation, and its predecessors in interest, also discovered upon said land large, valuable and extensive deposits of gypsum of good commercial quality, and that the same has been opened up and developed; that prior to and on the 27th day of September, 1909,

at the time when the President of the United States, acting by and through the Secretary of the Interior, attempted to withdraw and reserve said land herein described from mineral exploration, and prior to and at the time of the passage and approval of an Act of Congress entitled, 'An Act to Authorize the President of the United States to make Withdrawals of Land in Certain Cases,' approved by the President of the United States June 25, 1910, Chapter 421, and ever since and continuously up to the present time the said Lost Hills Mining Company has been and now is a *bona fide* occupant and in exclusive possession of the southwest quarter (SW. $\frac{1}{4}$) of section eighteen (18), township twenty-six (26) south, range twenty-one (21) east, Mount Diablo Meridian, to wit, said Lucile Placer Mining Claim, under a *bona fide* claim thereto by virtue of the location and work hereinbefore mentioned, and that at all of said times the work of drilling an oil well upon said southwest quarter (SW. $\frac{1}{4}$) of section eighteen (18), township twenty-six (26) south, range twenty-one (21) east, Mount Diablo Meridian, was actually, actively and diligently being carried on upon said land under such *bona fide* claim of title thereto, and was diligently continued to completion, as aforesaid; that applicant herein has expended over Seven Hundred Dollars (\$700.00) upon the development of the gypsum deposits upon said land, and over the sum of Fifteen Thousand Dollars (\$15,000) in drilling said well and in developing oil thereon. [38]

XVII.

That said lands contain no known lodes and are

valuable for their placer mineral contents only and have no value for purposes of agriculture or grazing or timber or stone, nor is there any water therein nor is there any stream of water nor watercourse running through the same.

XVIII.

That there are no adverse claims made to said southwest quarter (SW. $\frac{1}{4}$) of section eighteen (18), township twenty-six (26) south, range twenty-one (21) east, Mount Diablo meridian.

XIX.

That thereafter, and, to wit, on the 10th day of July, 1916, the Lost Hills Mining Company, did duly make and file its application for patent in the proper Land Office of the United States, to wit, The United States Land Office at Visalia, California, wherein and whereby it did apply to the United States of America and to the General Land Department thereof, in accordance with the laws of the United States of America, and the Regulations of the Department of the Interior in reference thereto, for a patent to said southwest quarter (SW. $\frac{1}{4}$) of section eighteen (18), township twenty-six (26) south, range twenty-one (21) east, Mount Diablo Meridian; that said application was numbered Mineral Entry No. 06318 and was known as such in said United States Land Office at Visalia, California.

XX.

That said application for said patent herein was made for and on behalf of the claimant, the Lost Hills Mining Company, the defendant herein, by R. E. Stearns, who was duly designated, authorized and empowered by a resolution of the Directors of

said defendant, Lost Hills Mining Company, a corporation, to make on [39] its behalf all necessary affidavits and other papers in writing pertaining to an application by said Company to the United States for a patent to said Lucile Placer Mining Claim; that said R. E. Stearns was at said time, and now, a person conversant with all of the facts sought to be established by the affidavits presented in support of said application for patent. That said application for patent was in the form of an affidavit and was accompanied by other affidavits in support thereof; that the said affidavit of application for patent set forth the authority of affiant, to wit, R. E. Stearns, to make application for patent to said land for and on behalf of the Lost Hills Mining Company; the company's qualification to make such application and to acquire a patent, the location of said placer mining land with the names of the locators, the transfer by the original locators of said land to the said Lost Hills Mining Company, the possession by said Lost Hills Mining Company and of their predecessors in interest, continuously from the 13th day of February, 1907, down to the date of making application, the extent of the work done in developing the gypsum and petroleum in said land, the quantity of gypsum and oil that had been developed, the amount of money that had been expended in developing the same, the facts that there were no intervening rights to said land, that the land had no streams or springs of water thereon and no growth of timber thereon, and that the land was of no value for any other purpose than for that of producing gypsum and petroleum, and an application for patent to said

lands as the Lucile Placer Mining Claim. That with said affidavit of application were filed all of the papers and documents necessary and required by the laws of the United States relating to the acquiring of title to placer mining claims, and the Rules and Regulations of the Department of [40] the Interior with reference thereto, all of which said papers were in due form and regularly and duly subscribed and sworn to.

XXI.

That upon the filing of said application for patent, the Register of the United States Land Office at Visalia, California, gave due notice, on or about the 10th day of July, 1916, that said Lost Hills Mining Company had made application for patent to the said southwest quarter (SW. $\frac{1}{4}$) of section eighteen (18), township twenty-six (26) south, range twenty-one (21) east, Mount Diablo Meridian, to wit, said Lucile Placer Mining Claim, as required by the Acts of Congress and the rules and regulations of the Department of the Interior of the United States relating to the sale and disposition of public lands chiefly valuable for petroleum; which said notice is being published in the Lost Hills Gusher, which is a newspaper published in the county of Kern, State of California, and will be published continuously for ten (10) consecutive weeks, the first publication being on or about the 11th day of July, 1916. That said Lost Hills Gusher in which said notice was published is a newspaper of established character and general circulation and was designated by said Register as the newspaper in which said notice was to be pub-

lished, and as the newspaper nearest said land.

XXII.

That said application for patent is made in good faith and is being prosecuted with due diligence with the view to having a patent thereto issued by the United States to the defendant, Lost Hills Mining Company, herein.

XXIII.

That the said defendant, said Lost Hills Mining Company, a corporation, did, heretofore, to wit, on December 2d, 1911, duly [41] make its mineral application No. 03458 for a patent, covering the Fog Horn Placer Mining Claim embracing the southeast quarter (SE. $\frac{1}{4}$) of section thirty-two (32), township twenty-six (26) south, range twenty-one (21) east, Mount Diablo Meridian, in the county of Kern, State of California; that said application was in form and in substance similar to the applications heretofore made by said defendant and now pending for patent covering the lands involved in this action; that the Honorable Commissioner of the General Land Office did, on the 29th day of November, 1915, clear list the said application of said defendant, said Lost Hills Mining Company, a corporation, covering said southeast quarter (SE. $\frac{1}{4}$) of said section thirty-two (32), and pursuant to said clear listing the patent of the United States has been issued and delivered to the said defendant said Lost Hills Mining Company, a corporation, for the said southeast quarter (SE. $\frac{1}{4}$) of said section thirty-two (32). That the said Honorable Commissioner of the General Land Office, in clear listing the application of

said defendant, said Lost Hills Mining Company, a corporation, for said southeast quarter (SE. $\frac{1}{4}$) of section thirty-two (32), township twenty-six (26) south, range twenty-one (21) east, did duly render his opinion and the opinion of the Land Department of the United States upon the *bona fides* of the said defendant, said Lost Hills Mining Company, upon said application and upon all of the applications for patent covering the lands involved in this action. That the said Honorable Commissioner of the General Land Office of the United States did, in his said decision, find, as a matter of fact: that the claim covering the said southeast quarter (SE. $\frac{1}{4}$) of section thirty-two (32) was located on the 14th day of February, 1907, by the predecessors of said defendant, said Lost Hills Mining Company, a corporation; that said locators, at the same time, with other [42] locators, located over twenty-two other tracts in the same vicinity and that the several lands so located were transferred to the said corporation, said defendant herein, said Lost Hills Mining Company; that each interested person, to wit, each locator, received his proportionate share of the stock issued and that in view of said locations and assignments and the circumstances relating thereto, there did exist and does exist no reason for questioning the good faith and regularity of the locations of said claims; that said defendants herein hereby respectfully refer to said decision and make the same a part hereof; that the location of said mining claims hereinabove set forth covering the lands described in plaintiff's bill of complaint, are included in said

twenty-two locations referred to in said opinion and decision of the Honorable Commissioner of the General Land Office of the United States hereinabove referred to.

XXIV.

Said defendants allege that the occupancy and claim to said property of said defendant, said Lost Hills Mining Company, a corporation, is not that of a trespasser and is not in violation of the proprietary and other rights of the plaintiff herein nor in violation of the laws of the United States or any of them, or the lawful orders or proclamations of the President of the United States or any of them, and is particularly not in violation of the orders of withdrawal of September 27th, 1909, of the President of the United States, acting by and through the Secretary of the Interior, as set forth in paragraph III of plaintiff's complaint, nor in disregard of nor by infringement upon the general governmental policy adopted by the United States for the production or conservation or disposal or use of the petroleum or gas contained in said lands or in other lands belonging to the United States, [43] and in this behalf this defendant further alleges that said defendant, said Lost Hills Mining Company, a corporation, and its predecessors in interest, in accordance with the laws of the United States relative to the prospecting, exploring, discovering, entering upon and developing of the valuable minerals and particularly petroleum and gypsum in the public lands of the United States, did enter upon said lands hereinbefore described, as herein set forth, at the express in-

vitiation of the plaintiff herein, and did proceed, in accordance with the laws of the United States, to prospect, explore, discover and develop the minerals therein contained and did diligently prosecute said work of prospecting, exploring, discovering and entering upon and developing said petroleum and gypsum until the same had been discovered and developed in commercial quantities.

XXV.

The defendants allege that all the matters set up in the bill of complaint herein are under the exclusive control and jurisdiction of the Honorable Secretary of the Interior of the United States and the Honorable Commissioner of the General Land Office of the United States; that this Court has no jurisdiction or authority to interfere with the exercise of said exclusive control and jurisdiction of said Honorable Secretary of the Interior and the Honorable Commissioner of the General Land Office of the United States, or to proceed with the hearing of this action while said application for patent proceedings are pending; that under and by virtue of the laws of the United States and the Acts of Congress relating to the disposition of public lands by the United States, and particularly of mineral lands, the only tribunal vested with power and authority to determine the matters set forth in plaintiff's bill of complaint, and all questions [44] of fact and law relating thereto, and as to whether or not said Lost Hills Mining Company is entitled to patents to said lands and is the owner thereof and has any claim thereto, and as to whether or not said defendant, said Lost Hills Min-

ing Company, a corporation, should be granted and given a patent to and continue in possession of said lands and develop, operate and extract minerals therein contained therefrom, is the General Land Department of the United States, at the head of which is the Honorable Commissioner of the General Land Office, who acting under the direction, supervision and control of the Honorable Secretary of the Interior of the United States, has exclusive jurisdiction, power, supervision and control over all matters which relate to the disposition, occupancy and use of the public lands of the United States and of the lands involved in this action. That until said Honorable Commissioner of said General Land Office, acting as the head of said General Land Department of the United States and under the supervision, direction and control of the Secretary of the Interior, shall have determined the rights of said defendants herein in and to said lands in said pending applications for patent proceedings, and shall have denied said applications for patent to said lands, this Honorable Court has and can have no jurisdiction over the subject matter or of the parties involved in said applications for patent and in this proceeding or to determine, order or decide that said Lost Hills Mining Company, a corporation, and said Universal Oil Company, a corporation, defendants herein, or each, or any of them, should make full disclosure or set up their claims or the claims of either of them herein, or to said lands described in said bill of complaint, or any part thereof, or to determine, order or decide that said defendants, or

either of them be required to make full, true and direct answer, respectively, to all or [45] singular the matters or things stated or charged in plaintiff's complaint herein, or to declare that said lands, or any part thereof, set forth in said bill of complaint, and hereinabove described, to have been at all times from and after the 27th day of September, 1909, lawfully withdrawn from mineral exploration or from all or any forms of location or settlement or selection or filing or entry or disposal under the mineral or nonmineral public land laws of the United States, or to adjudge or decree that said defendants herein, to wit, said Lost Hills Mining Company, a corporation, or said Universal Oil Company, a corporation, have no estate, or right, or title, or interest, or claim, in or to said lands or any part thereof, or in or to any minerals or mineral or mineral deposits contained in or under said lands or any parts thereof, or to adjudge or decree that all or singular of said lands, or any part thereof, together with, or without all or any of the minerals, or mineral or mineral deposits or the mineral oil or petroleum or gas therein or thereunder contained to be the perfect property, or otherwise, of the plaintiff herein, free or clear of the claims or claim of said defendants, or either of them, or to enjoin each, or all, or any of the defendants herein, to wit, said Lost Hills Mining Company, a corporation, or said Universal Oil Company, a corporation, or the officers or officer, or agent or agents, or servants or servant, or attorneys or attorney of said defendants, or either of them, during the progress of said action, or thereafter, or

at all, finally or perpetually, from asserting or claiming any right, or title, or interest, or claim, or lien in or to the said lands, or any part thereof, or in or to any of the minerals or mineral or mineral deposits therein or thereunder contained, or to enjoin each or all or either of said defendants, to wit, said Lost Hills [46] Mining Company, a corporation, or said Universal Oil Company, a corporation, or the officers or officer, or agents or agent, or servants or servant, of said defendants, or either of them, during the progress of this suit, or thereafter, or at all, finally or perpetually, or at all, from going upon any part or portion of said land or from, in any manner, using any of said lands or premises, or any part thereof, or from in any manner extracting, removing or using any of the minerals, mineral or mineral deposits in or under said lands or premises, or any part or portion thereof, or any of the other or natural products thereof, or from in any manner committing any trespass or waste upon any of said lands or with reference to any of the minerals, mineral or mineral deposits therein or thereunder or any of the other or natural products thereof, or to order or determine or decide or decree that an accounting be had by said defendants, or either or any of them, wherein said defendants, or either or any of them, shall make full or complete or itemized or correct disclosure of the quantities of mineral, or particularly of petroleum removed or extracted or received by them, or either of them, from said lands, or any or other property or thing of value received from part or portion thereof, or of any money or moneys

the sale or disposition of any or all of the minerals or mineral extracted from said lands, or any part or portion thereof, or of any rent or profits received under any sale or lease or transfer or conveyance or contract or agreement concerning said lands or any part thereof, or that the plaintiff may recover from said defendants or either or any of them, respectively, all damages or any damages sustained by plaintiff under these premises, or to determine or decree or adjudge or order or decide that the plaintiff herein is entitled to any damage whatsoever in these premises, or to appoint a [47] Receiver to take possession of said lands or of all or any wells or well, or derricks or derrick, or drills or drill, or pumps or pump, or storage vats or storage vat, or pipes or pipe, or pipe lines or pipe line, or machinery, or tools or tool, or appliances or appliance of every character or any character thereof, belonging to or in the possession of said defendants or either of them, which have been used or now are being used in the extraction or storage or transportation or refining or sale or manufacture or in any other manner in the production of petroleum or petroleum products or of any minerals or mineral or mineral deposits from said land, or any part or portion thereof, for the purpose of continuing, or otherwise, and with full power and authority or with full power or authority, to continue the operation on said lands or any part thereof, of the production or sale of petroleum or other minerals or mineral or mineral deposits where such course is necessary to protect the alleged property of the complainant

against injury or waste, or for any other purpose or purposes, or otherwise, or at all, or for the preservation or production or use of the oil or gas in said lands, or in any portion thereof, or the wells or well, or derricks or derrick, or pumps or pump, or tanks or tank, or storage vats or storage vat, or pipes or pipe, or pipe-lines or pipe-line, or houses or house, or shops or shop, or tools or tool, or machinery, or appliances or appliance being used by said defendants, or either of them, or otherwise, or the officers or officer, or agents or agent, or assigns or assign, of said defendants, or either of them, in the production, or transportation, or manufacture, or sale of petroleum or other minerals or mineral or mineral deposits from said lands or any part thereof, or to vest such receiver with the usual or general or any powers vested in receivers of courts of chancery, or otherwise. [48]

WHEREFORE, defendants pray that the plaintiff take nothing by this action against either of these defendants, and that said action be dismissed and that these defendants recover their costs and disbursements herein expended and for such further relief as to the Court in equity may seem meet in the premises.

MORRISON, DUNNE & BROBECK,
JOSEPH D. REDDING,

Attorneys for said Defendants, said Lost Hills Mining Company, a Corporation, and said Universal Oil Company, a Corporation. [49]

United States of America,
State of California,
City and County of San Francisco,—ss.

R. A. Morton, being first *duly, deposes* and says:

That he is an officer of one of the defendants in the above-entitled action, namely, the Secretary of said Lost Hills Mining Company, a corporation, and as such makes this affidavit of verification; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

R. A. MORTON.

Subscribed and sworn to before me this 21st day of August, 1916.

[Seal]

W. W. HEALEY,
Notary Public in and for the City and County of San Francisco, State of California. [50]

Received copy of within Answer this 24th day of August, 1916.

E. J. JUSTICE,
A. E. CAMPBELL,
FRANK HALL,
Attys. for Pltf.

[Endorsed]: In Equity—No. A-57. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Lost Hills Mining Company and Universal Oil Company,

Defendants. Answer of Defendants. Filed San Francisco, Aug. 25, 1916. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. Joseph D. Redding, Attorney for Defendants, Crocker Building, San Francisco, Cal. [51]

Return on Service of Writ.

United States of America,
Northern District of California,—ss.

I hereby certify and return that I served the annexed Notice of Motion for Restraining Order and Receiver on the therein named Lost Hills Mining Company and Universal Oil Company, and Joseph D. Redding, their attorney of record, by handing to and leaving a true and correct copy thereof with Earl H. Pier, as attorney and member of the firm of Redding, Boalt & Pier, personally, at San Francisco, in said District, on the 31st day of July, A. D., 1916.

J. H. HOLOHAN,

U. S. Marshal.

By Otis R. Bohn,
Office Deputy. [52]

*In the District Court of the United States for the
Southern District of California, Northern Division,
Ninth Circuit.*

IN EQUITY—A-57.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOST HILLS MINING COMPANY, and UNI-
VERSAL OIL COMPANY,

Defendants.

Notice of Motion for Restraining Order and Receiver.

To Lost Hills Mining Company and Universal Oil Company, and Joseph D. Redding, Their Attorney of Record.

You, and each of you, will take notice that the plaintiff, the United States of America, will move before the United States District Court for the Southern District of California, and the Judge thereof, Robert S. Bean, United States District Judge, sitting by special assignment, at the courtroom of the said Court in the Postoffice Building at San Francisco, California, on the 15th day of August, 1916, at 10 o'clock A. M. in the above-entitled cause, for the granting of an order restraining you, and each of you, your officers, agents, servants and attorneys, from taking or moving from the said premises described in the bill of complaint herein, any of the mineral oil or petroleum deposited therein, or any [53] of the gas in or under said land, and from committing in any manner any trespass or waste upon any of said land, or with reference to any of the minerals deposited therein, pending the disposition of the said cause or the further order of this Court.

And you, and each of you, will further TAKE NOTICE that the plaintiff, the United States of America, will then and there move the said Court, and the Judge thereof, in the above-entitled cause for the granting of an order appointing a receiver for the property described in the Bill of Complaint herein, and operated by you, and each of you, and for

the oil and petroleum heretofore extracted from said land, to be dealt with by the receiver in such manner as to the Court may seem proper.

The above motions will be submitted upon the verified bill of complaint on file herein, affidavits, records, documents, oral testimony and a certified copy of the following depositions and testimony filed in that certain proceeding pending before the register and receiver of the United States Land Office, at Visalia, California, entitled:

“Department of the Interior, United States Land Office, Visalia, California, before the Register and Receiver, *United States v. Lost Hills Mining Company*, involving mineral applications numbers 03431, 03432, 03448, 03457, 03459, Visalia, California, Land District.”

to wit, the deposition and testimony of Orlando D. Barton, taken on February 28, 1916, before the Register and Receiver of the United States Land Office, at Visalia, California; the deposition and testimony of L. E. Prestage, taken before the Register and Receiver of the United States Land Office at Visalia, California, on April 19, 1916; the depositions of H. E. Covey and W. L. McLaine, taken before T. F. Allen, [54] Notary Public, at Bakersfield, California, on April 18, 1916; and the deposition of Geo. A. Coffey, taken before L. B. Hayhurst, Notary Public, at Fresno, California, on April 20, 1916.

Dated this 31st day of July, 1916.

E. J. JUSTICE,
FRANK HALL,
A. E. CAMPBELL,

Solicitors for the Plaintiff, United States of
America. [55]

[Endorsed]: In Equity—A-57. In the District
Court of the United States for the Sou. Dist. of Cali-
fornia, Nor. Div. 9th Cir. United States of America,
Plaintiff, vs. Lost Hills Mining Company and Uni-
versal Oil Company, Defendants. Notice of Motion
for Restraining Order and Receiver. Filed Aug.
2, 1916, San Francisco. Wm. M. Van Dyke, Clerk.
T. F. Green, Deputy. [56]

*In the District Court of the United States, in and for
the Southern District of California, Northern
Division, Ninth Circuit.*

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants.

**Notice of Motion for Continuance of Hearing of
Motion for Appointment of Receiver, etc.**

To the United States of America, Plaintiff in the
Above-entitled Action, and to E. J. Justice and
Frank Hall, Its Attorneys:

YOU AND EACH OF YOU WILL PLEASE
TAKE NOTICE that on Tuesday, the 15th day of
August, 1916, at the hour of ten o'clock A. M., or
as soon thereafter as counsel can be heard at the
Federal Building in the city and county of San Fran-
cisco, California, Lost Hills Mining Company and
Universal Oil Company, the defendants in the above-
entitled suit, will move the Court to continue the
hearing of the motion for the appointment of a re-
ceiver and for a temporary injunction and on the
jurisdictional defense interposed and set up by the
said defendants, until Monday the 28th day of Au-
gust, 1916, at the hour of ten o'clock A. M., or to such
other time as may by the Court be deemed proper
under the circumstances.

Said motion will be based and heard upon the files
herein and upon the affidavit of R. L. McWilliams,
one of the solicitors for said defendants, a copy of
which is hereto attached and made a part hereof.

JOS. D. REDDING,

MORRISON, DUNNE & BROBECK,

Solicitors for Said Defendants. [57]

*In the District Court of the United States, in and for
the Southern District of California, Northern
Division, Ninth Circuit.*

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants.

**Affidavit of R. L. McWilliams in Support of Motion
for Continuance of Hearing of Motion for
Appointment of Receiver, etc.**

State of California,

City and County of San Francisco,—ss.

R. L. McWilliams, being first duly sworn, deposes
and says:

That he is one of the solicitors for Lost Hills Mining Company and Universal Oil Company, the defendants in the above-entitled action;

That on July 28, 1916, the above-entitled Court set down the motion for the appointment of a Receiver and the motion for a temporary injunction for hearing on August 15, 1916; that as affiant is informed and believes, and therefore alleges the fact to be, on said day and at the time the said matters were set down for hearing, as aforesaid, Mr. Joseph D. Redding, one of the solicitors for the said defendants, in-

formed the Court that he had theretofore served notice that the said defendants desired to take the depositions of several witnesses in Washington, including the deposition of the Commissioner of the General Land Office and the Secretary of the Interior of the United [58] States with particular reference to the jurisdiction of this court to hear the above-entitled suit, or to determine any of the issues therein pending proceedings in the Land Department of the United States, and that it might be that he would not complete the taking of the said depositions in time to enable him to be in San Francisco on the said 15th day of August, 1916.

That thereafter and on or about the 10th day of August, 1916, affiant received from the said Joseph D. Redding, a telegram sent from Washington, D. C., in which the said Joseph D. Redding stated that he had sent a telegram to E. J. Justice, one of the solicitors for the plaintiff herein, stating that he was proceeding with the taking of the depositions above referred to, and that it would undoubtedly take until the middle of the following week before he could finish the taking of said depositions, and that he would thereby be precluded from reaching San Francisco before the 20th of August, 1916; that this would necessitate the hearing above referred to being postponed about one week; that the evidence that he was obtaining, and seeking to obtain by said depositions goes to the question of the jurisdiction of the court, the right of the plaintiff herein to an injunction and to the question of the measure of damages; that upon the receipt of the said telegram affiant communicated

with the said E. J. Justice and was informed that he had taken the matter up with Judge Bean who was to preside at the hearing of the said motions.

That the said Joseph D. Redding is one of the solicitors for the said defendants in the above-entitled suit, and that it would not be safe for said defendants to proceed with the hearing of the said matters until the return of the said Joseph D. Redding [59] to San Francisco, and until the arrival of the depositions above referred to.

R. L. McWILLIAMS.

Subscribed and sworn to before me this 14th day of August, 1916.

[Seal] W. W. HEALEY,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. A-57—In Equity. United States District Court, Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Lost Hills Mining Company et al., Defendants. Notice of Defendant's Motion and Affidavit of R. L. McWilliams, in Support of Motion for Continuance of Hearing on Plffs. Motion for Temporary Injunction Appointment of Receiver and Jurisdictional Question. Receipt of a copy of the Within Notice of Motion is Hereby Admitted This 14th Day of August, 1916, at 3:55 P. M. E. J. Justice, A. E. Campbell, Frank Hall, Attorneys for Plaintiff. Filed San Francisco, Aug. 15, 1916. Wm. M. Van Dyke, Clerk. T. F. Green, Deputy. Joseph D. Redding, Morrison, Dunne & Brobeck,

Crocker Building, San Francisco, Cal., Attorneys for
said Defendants. [60]

At a special January Term, A. D. 1916, of the District Court, of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the City of San Francisco, California, on Tuesday, the fifteenth day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-57—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,
vs.

LOST HILLS MINING COMPANY et al.,
Defendants.

Minutes of Court—August 15, 1916—Order Continuing Hearing of Motion for Restraining Order, etc.

This cause coming on this day to be heard on complainants' motion for a restraining order, and also to be heard on an application for the appointment of a receiver; Frank Hall, Esq., Special Assistant to the U. S. Attorney General appearing as counsel for the United States; Peter F. Dunne, Esq., appearing as counsel for defendants Lost Hills Mining Company et al., R. L. McWilliams, Esq., appearing on behalf

of Joseph D. Redding, Esq., of counsel also for defendants Lost Hills Mining Company et al.; John P. Doyle, one of the official shorthand reporters of this court, being present and acting as such; and it appearing that defendants have moved the Court for an order continuing this cause for said hearing; and said motion for a continuance having been argued, in support thereof, by R. L. McWillaims, Esq., appearing as aforesaid on behalf of Joseph D. Redding, Esq., of counsel for defendants Lost Hills Mining Company et al., and by Peter F. Dunne, Esq., of counsel for defendants Lost Hills Mining Company et al., and in opposition thereto by Frank Hall, Esq., Special Assistant to [61] the U. S. Attorney General, of counsel for the United States; it is by the Court ordered that this cause be, and the same hereby is continued for said hearing until Thursday, the 17th day of August, 1916, at 10 o'clock A. M. [62]

At a special January Term, A. D. 1916, of the District Court, of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Wednesday, the sixteenth day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-57—EQUITY.

THE UNITED STATES OF AMERICA,

Complainants,

vs.

LOST HILLS MINING COMPANY et al.,

Defendants.

**Minutes of Court—August 16, 1916—Order
Continuing Motion for Restraining Order, etc.**

This cause coming on this day to be heard on defendants' motion for a continuance of this cause for hearing on complainants' motion for a restraining order and an application for the appointment of a receiver herein; Frank Hall, Esq., Special Assistant to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendants Lost Hill Mining Company and Universal Oil Company; Peter F. Dunne, Esq., also appearing as counsel for said defendants Lost Hills Mining Company and Universal Oil Company; John P. Doyle, one of the official shorthand reporters of this court, being present and acting as such; and said motion for continuance having been argued, in support thereof, by Earl H. Pier, Esq., and R. L. McWilliams, Esq., appearing as aforesaid on behalf of Joseph D. Redding, Esq., of counsel for defendants Lost Hills Mining Company and Universal Oil Company, and by Peter F. Dunne, Esq., of counsel for defendants Lost Hills Mining Company and Universal Oil Company, and in opposition thereto by Frank Hall, Esq., Special Assist-

ant to the U. S. Attorney General, of counsel for [63] the United States; it is by the Court ordered that this cause be, and the same hereby is continued for hearing on said motion for injunction and application for appointment of receiver until Monday, the 21st day of August, 1916, at 10 o'clock A. M. [64]

At a special January Term, A. D. 1916, of the District Court, of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Thursday, the seventeenth day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-57—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,
vs.

LOST HILLS MINING COMPANY et al.,
Defendants.

**Minutes of Court—August 17, 1916—Hearing on
Motion for Injunction Pendente Lite, etc.**

This cause coming on this day to be heard on complainants' motion for an injunction *pendente lite*, and also to be heard on an application for the appointment of a receiver herein; Frank Hall, Esq., Special Assistant to the U. S. Attorney General, appearing as counsel for the United States; Earl H.

Pier, Esq., and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendants Lost Hills Mining Company and Universal Oil Company; and Peter F. Dunne, Esq., also appearing as counsel for said defendants Lost Hills Mining Company and Universal Oil Company; John P. Doyle, one of the official shorthand reporters of this court, being present and acting as such; and this cause having been continued for hearing until the hour of 2 o'clock P. M., of this day, and having been called again therefor at the hour of 2 o'clock P. M.; and counsel and shorthand reporter being present as before; and counsel for the respective parties having stipulated that the testimony to be taken and evidence to be admitted in cause No. A-37—Equity, N. D., The United States of America, Complainants, vs. Devil's Den Consolidated Oil Company et al., Defendants, may [65] be used, as far as applicable, in this cause; and certain testimony having been taken, and certain exhibits admitted in evidence in said cause No. A-37—Equity, N. D.; it is ordered that this cause be, and the same hereby is continued for said hearing until Monday, the 21st day of August, 1916, at 10 o'clock A. M. [66]

At a special January Term, A. D. 1916, of the District Court, of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Monday, the twenty-first day of August, in the

year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-57—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,
vs.

LOST HILLS MINING COMPANY et al.,
Defendants.

**Minutes of Court—August 21, 1916—Hearing on
Motion for Injunction Pendente Lite, etc.**

This cause coming on this day to be further heard on complainants' motion for a temporary injunction, and also coming on to be further heard on an application for the appointment of a receiver; E. J. Justice, Esq., Frank Hall, Esq., and A. E. Campbell, Esq., Special Assistants to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendants Lost Hills Mining Company and Universal Oil Company et al.; Peter F. Dunne, Esq., also appearing as counsel for said defendants Lost Hills Mining Company, Universal Oil Company et al.; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and Peter F. Dunne, Esq., of counsel as aforesaid for defendants Lost Hills Mining Company et al., having on behalf of all defendants, objected to any further proceedings in the hearing of the motion for tem-

porary injunction and application for appointment of a receiver until the determination of a question [67] as to the jurisdiction of this court, thereupon, on motion of said counsel for defendants, and with the consent in open court of Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, it is ordered that said jurisdictional question be now heard, and that in the meantime said motion for injunction and application for appointment of receiver remain in *statu quo*; and it is further ordered, on motion of Peter F. Dunne, Esq., of counsel as aforesaid for defendants Lost Hills Mining Company et al., and with the consent in open court of Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, that all proceedings, evidence and argument in the hearing of a similar jurisdictional question in cause No. A-37—Equity, The United States of America, Complainants, vs. Devil's Den Consolidated Oil Company et al., Defendants, shall apply to and be considered in connection with the jurisdictional question in this cause; and said jurisdictional question having been argued, in connection with the argument of a similar jurisdictional question in said cause No. A-37—Equity, in opposition to the jurisdiction of this court herein, by R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendants Lost Hills Mining Company et al., and by Peter F. Dunne, Esq., of counsel for said defendants Lost Hills Mining Company et al., and in support of the jurisdiction of this court by Frank Hall, Esq., and E. J. Justice,

Esq., Special Assistants to the U. S. Attorney General, of counsel for the United States; it is, at the hour of 5 o'clock P. M., ordered that this cause be, and the same hereby is, continued for said hearing until Tuesday, the 22d day of August, 1916, at 10 o'clock A. M. [68]

At a special January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Tuesday, the twenty-second day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-57—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

LOST HILLS MINING COMPANY et al.,
Defendants.

**Minutes of Court—August 22, 1916—Hearing on
Motion for Injunction Pendente Lite, etc.**

This cause coming on this day to be further heard on a jurisdictional question; E. J. Justice, Esq., and Frank Hall, Esq., Special Assistants to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., and R. L. McWill-

iams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendants Lost Hills Mining Company and Universal Oil Company; Peter F. Dunne, Esq., also appearing as counsel for said defendants Lost Hills Mining Company and Universal Oil Company; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and said jurisdictional question having been further argued, in opposition to the jurisdiction of this Court herein, by Peter F. Dunne, Esq., of counsel for defendants Lost Hills Mining Company et al., and in support of the jurisdiction of the Court by E. J. Justice, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States; and this cause having been submitted to the Court for its consideration and decision on said jurisdictional question and the argument thereof, it is now by the Court ordered that defendants' plea in opposition to the jurisdiction [69] of this Court herein be, and the same hereby is overruled and denied, the Court holding that it has jurisdiction in this cause; thereupon, on motion of Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, and over the objection of Peter F. Dunne, Esq., of counsel for defendants Lost Hills Mining Company et al., it is ordered that at the hour of 2 o'clock P. M., of this day, the Court shall proceed with the further hearing of the motion for a temporary injunction and the application for appointment of a receiver; and court, at the hour of 12:15 o'clock P. M., having taken a recess until the hour of 2 o'clock P. M., of

this day; and court at the hour of 2 o'clock P. M., having reconvened; and counsel and shorthand reporter being present as before, except that E. J. Justice, Esq., Special Assistant to the U. S. Attorney General, does not now appear as one of complainants' counsel; and counsel for the United States having announced that the Government is ready to proceed with the further hearing of complainants' motion for a temporary injunction and the application for the appointment of a receiver, and the Court having ordered that the hearing proceed, and that all testimony and proceedings herein shall apply to and be considered also on the hearing of a similar motion and application in each of the causes Nos. A-37—Equity and A-52—Equity, so far as applicable; and the deposition of Joseph Jansen, taken pursuant to stipulation of counsel, before J. D. Brown, Notary Public, having been offered by counsel for the Government, it is ordered that said deposition be opened and filed herein, and also in causes Nos. A-37—Equity and A-52—Equity; and said deposition of Joseph Jansen having been read to the Court by Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States; and, in connection with the said deposition, certain exhibits having been offered and admitted in evidence on behalf of the United States, to wit: Plffs. Ex. "A," plat, sectional [70] of San Joaquin Valley, showing gypsite deposits, etc.; Plffs. Ex. "B," Circular No. 111, of Dec., 1913, issued by University of California, on the use of lime and gypsum, etc.; Plffs. Ex. "C," sketch showing

gypsum occurrences, etc.; Plffs. Ex. "D," map or plat, showing various methods of sampling; Plffs. Ex. "E," plat showing "Signal Placer," on SE. $\frac{1}{4}$ of Sec. 30, Tp. 26 S., R. 21 E.; Plffs. Ex. "F," plat showing gypsite, etc., at "Cd.," on N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 30, Tp. 26 S., R. 21 E.; Plffs. Ex. "G," plat showing "Lost Hills Placer," on NW. $\frac{1}{4}$ of Sec. 30, -26-21; Plffs. Ex. "H," plat showing "Petroleum Placer" on NW. $\frac{1}{4}$ of Sec. 32-26-S. 21 E.; Plffs. Ex. "I," plat showing "Eagle Placer" on NE. $\frac{1}{4}$ of Sec. 32-26-21-E.; Plffs. Ex. "J," plat showing "Judge Placer" on SW. $\frac{1}{4}$ of Sec. 32-26 S., R. 21 E.; Plffs. Ex. "K," copy assayer's certificate, Smith Emery & Co., of Dec. 8, 1914; Plffs. Ex. "L," copy assayer's certificate, H. Coffman, of March 16, 1916; and Plffs. Ex. "M," eleven (11) photographs, illustrating certain characteristics of gypsum, character land, etc., with legends attached; and the deposition of Orlando D. Barton, taken before the Register and Receiver of the U. S. Land Office at Visalia, Cal., on February 28, 1916, with certificate attached, of said Register and Receiver, having been offered by Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, it is ordered that said deposition be opened and filed in this cause and in causes Nos. A-37—Equity and A-52—Equity; and said deposition of Orlando D. Barton having been read to the court by said counsel for the Government; and the depositions of George A. Coffey, taken before L. B. Hayhurst, Notary Public, at Fresno, Cal., on April 20, 1916, same having been taken pursuant to stipu-

lations, and having a certificate attached of the Register and Receiver of the U. S. Land Office at Visalia, California, having been offered by said counsel for the Government, it is ordered that same be opened, and filed in this cause and in [71] causes Nos. A-37—Equity and A-52—Equity; and said depositions having been read to the court by said counsel for the Government; it is, at the hour of 5:05 o'clock P. M., ordered that this cause be, and the same hereby is continued for further hearing until Wednesday, the 23d day of August, 1916, at 10 o'clock A. M. [72]

At a special January Term, A. D. 1916, of the District Court, of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Wednesday, the twenty-third day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-57—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

LOST HILLS MINING COMPANY et al.,
Defendants.

**Minutes of Court—August 23, 1916—Hearing on
Motion for Injunction Pendente Lite, etc.**

This cause coming on this day to be further heard on complainants' motion for a temporary injunction,

and also to be further heard on an application for the appointment of a receiver; E. J. Justice, Esq., and Frank Hall, Esq., Special Assistants to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendants Lost Hills Mining Company and Universal Oil Company; Peter F. Dunne, Esq., also appearing as counsel for said defendants Lost Hills Mining Company and Universal Oil Company; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, having offered a copy of depositions of W. L. McLaine and H. E. Covey, taken before T. F. Allen, Notary Public, at Bakersfield, California, on April 18, 1916, for use in the U. S. General Land Office, with certificate attached of the Register and Receiver of the U. S. Land Office at Visalia, [73] California, which depositions are admitted in evidence and read to the Court by said counsel for the United States; and Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, having offered a copy of depositions of L. E. Prestage, taken before the United States Land Office at Visalia, California, with certificate attached of Frank Laning, Register of said Land Office, which depositions are admitted in evidence on behalf of complainants and read to the court by said counsel for the United States; and Frank Hall, Esq., Special Assistant to the U. S. At-

torney General, of counsel for the United States, having offered certain affidavits, which are admitted in evidence on behalf of complainants, and read to the Court by said counsel for the United States, to wit: Affidavit of Orlando D. Barton, taken before J. S. Clack, Notary Public, on October 19, 1915; affidavit of J. H. Favorite, taken before T. L. Baldwin, Deputy Clerk of the U. S. District Court for the Northern District of California, on June 9th, 1916; and two affidavits of C. L. McDonald, taken before A. H. Thomas, Notary Public, on August 10, 1916; and J. G. Dean and D. A. Mulvane having respectively been called and sworn as witnesses on behalf of the United States, and having given their testimony; and, after a recess of court from the hour of 12 o'clock, M., until the hour of 2 o'clock P. M., of this day, this cause having again been called for further hearing, and counsel and shorthand reporter being present as before; D. A. Mulvane, a witness on behalf of the United States, having again taken the stand for further examination, and having given his testimony; and P. A. English and Silas F. Gillan having respectively been called and sworn as witnesses on behalf of the United States, and having given their testimony; and, in connection with the testimony of the last-named witness, the Government having offered an exhibit, [74] which is admitted in evidence in its behalf, to wit: Plffs. Ex. N, copy of proof of labor performed on Sec. 30, Tp. 26, S. R. 21 E., M. D. M., as recorded in the recorder's office of Kern County, California; it is, at the hour of 4 o'clock P. M., ordered that this cause be, and the

same hereby is continued until Thursday, the 24th day of August, 1916, at 10 o'clock A. M., for further hearing. [75]

At a special January Term, A. D. 1916, of the District Court, of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Thursday, the twenty-fourth day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-57—EQUITY.

THE UNITED STATES OF AMERICA,
Complainants,

vs.

LOST HILLS MINING COMPANY et al.,
Defendants.

**Minutes of Court—August 24, 1916—Hearing on
Motion for Injunction Pendente Lite, etc.**

This cause coming on this day to be further heard on complainants' motion for a temporary injunction; E. J. Justice, Esq., and Frank Hall, Esq., Special Assistant to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendants Lost Hills Mining Company and Uni-

versal Oil Company; Peter F. Dunne, Esq., also appearing as counsel for defendants Lost Hills Mining Company and Universal Oil Company; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; it is, on motion of Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, ordered that the bill of complaint in this cause shall be considered as part of the evidence, etc., on this hearing; and complainants having offered an exhibit, which is admitted in [76] evidence in their behalf, to wit: Plff. Ex. "O," Oil statement of Devil's Den Consolidated Oil Company, January, 1912, to September, 1915; and the Government having rested on this hearing; thereafter it is ordered that this cause be, and the same hereby is continued until Friday, the 25th day of August, 1916, at 10 o'clock A. M., for further hearing. [77]

At a special January Term, A. D. 1916, of the District Court, of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof in the city of San Francisco, California, on Friday, the twenty-fifth day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-57—EQUITY.

THE UNITED STATES OF AMERICA,

Complainants,

vs.

LOST HILLS MINING COMPANY et al.,

Defendants.

**Minutes of Court—August 25, 1916—Hearing on
Motion for Injunction Pendente Lite, etc.**

This cause coming on this day to be further heard on complainants' motion for a temporary injunction, and also to be further heard on an application for the appointment of a receiver; E. J. Justice, and Frank Hall, Esq., Special Assistants to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendants Lost Hills Mining Company and Universal Oil Company; Peter F. Dunne, Esq., appearing as counsel for defendants Lost Hills Mining Company and Universal Oil Company; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and, after a recess from the hour of 12 o'clock M., until the hour of 2 o'clock P. M., of this day, this cause having been again called for said further hearing, and counsel and shorthand reporter being present as before; and Peter F. Dunne, Esq., of counsel for defendants Lost Hills Mining Company and Universal Oil Company, having offered two exhibits, which are admitted in evidence on behalf

of defendants, [78] to wit: Defts. Ex. "Z," pages 261 to 270, inclusive, from "Mineral Resources of the United States," 1914; and Defts. Ex. "Z-1," reproduction of diagram on page 262 of volume 2, "Mineral Resources of the United States, 1914"; and R. L. McWilliams, Esq., appearing on behalf of Joseph D. Redding, Esq., of counsel for defendants Lost Hills Mining Company and Universal Oil Company, having offered certain affidavits, which are admitted in evidence on behalf of defendants and read to the court by said counsel to wit: Defts. Ex. "B," affidavit of R. A. Morton, taken on 8/21/1916, before W. W. Healey, Notary Public, with exhibits attached; and Defts. Ex. "C," affidavit of Chas. W. Barrett, taken on 6/22/1916, before W. W. Healey, Notary Public, with exhibits attached; it is, at the hour of 4:25 o'clock P. M., ordered that this cause be, and the same hereby is, continued for further hearing until Monday, the 28th day of August, 1916, at 10 o'clock A. M. [79]

At a special January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Monday, the twenty-eighth day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-57—EQUITY.

THE UNITED STATES OF AMERICA,

Complainants,

vs.

LOST HILLS MINING COMPANY et al.,

Defendants.

**Minutes of Court—August 28, 1916—Hearing on
Motion for Injunction Pendente Lite, etc.**

This cause coming on this day to be further heard on complainants' motion for a temporary injunction, and also to be heard on an application for the appointment of a receiver; E. J. Justice, Esq., and Frank Hall, Esq., Special Assistants to the U. S. Attorney General, appearing as counsel for the United States; Earl H. Pier, Esq., R. L. McWilliams, Esq., and Joseph D. Redding, and Peter F. Dunne, Esq., appearing as counsel for defendants Lost Hills Mining Company and Universal Oil Company; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and W. O. Todd having been called and sworn as a witness on behalf of defendants, and having given his testimony; and Roy A. Bishop, a witness on behalf of defendants, having been recalled for further examination, and having given his testimony; and, in connection with the testimony of said witness, defendants having offered certain exhibits, which are admitted in evidence in their behalf, to wit, Defts. Ex. "A-2" (there being no exhibit marked [80] "A-1"), blue-print, Universal Oil Company, pipe-

lines, drawn 3/1/1914, by R. B. M., pipe-lines on Sec. 32-26-21; Defts. Ex. "A-3," blue-print Universal Oil Company, gas pipe-lines, drawn on 3/1/1914, by R. B. M., pipe-lines located on Sec. 32-26-21; Defts. Ex. "A-4," blue-print, Universal Oil Company, water pipe-lines, drawn by R. B. M. on 3/1/1914; pipe-lines located on Sec. 32-26-21; Defts. Ex. "A-5," statement marked "Lost Time Record in Hours, Devil's Den Consolidated Oil Company, 6 Months Ending June 30, 1916"; Defts. Ex. "A-6," statement marked "Lost Time Record, Universal Oil Company, Six Months Ending June 30, 1916"; and, after a recess of court from the hour of 12:05 o'clock P. M., until the hour of 2 o'clock P. M. of this day, this cause having been again called for further hearing, and counsel and shorthand reporter being present as before; and Roy A. Bishop, a witness on behalf of defendants, having again taken the stand for further examination, and having given his testimony; thereafter, at the hour of 4:35 o'clock P. M., it is ordered that this cause be, and the same hereby is, continued until Tuesday, the 29th day of August, 1916, at 10 o'clock A. M., for further hearing. [81]

At a special January Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the courtroom thereof, in the city of San Francisco, California, on Tuesday, the twenty-ninth day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-57—EQUITY.

THE UNITED STATES OF AMERICA,

Complainants,

vs.

LOST HILLS MINING COMPANY et al.,

Defendants.

**Minutes of Court—August 29, 1916—Hearing on
Motion for Injunction Pendente Lite, etc.**

This cause coming on this day to be further heard on complainants' motion for a temporary injunction, and also to be heard on an application for the appointment of a receiver; E. J. Justice, Esq., and Frank Hall, Esq., Special Assistants to the U. S. Attorney, appearing as counsel for the United States; Earl H. Pier, Esq., R. L. McWilliams, Esq., Joseph D. Redding, Esq., and Peter F. Dunne, Esq., appearing as counsel for defendants Lost Hills Mining Company and Universal Oil Company; I. Benjamin, one of the official shorthand reporters of this court, being present and acting as such; and Thos.

H. Means, duly sworn as a witness in cause No. A-37—Equity, having been called herein as a witness on behalf of defendants, and having given his testimony; and defendants having rested; and Frank Hall, Esq., Special Assistant to the U. S. Attorney General, having moved the Court that he be allowed, on behalf of complainants, to prepare and file an affidavit of C. D. Hamel, to which affidavit will be attached [82] the affidavits of three or four persons taken before said C. D. Hamel as Special Agent of the U. S. Land Department, which motion is opposed by Peter F. Dunne, Esq., of counsel for defendants Lost Hills Mining Company and Universal Oil Company, it is ordered that said motion be, and the same hereby is, granted, and that, accordingly, complainants be, and hereby are allowed within twenty (20) days to prepare, serve and file said affidavits; and E. D. Latham and J. W. Kingsburg, heretofore duly sworn as witnesses in cause No. A-37—Equity, having been respectively called and sworn as witnesses on behalf of defendants in rebuttal, and having given their testimony; and, after a recess of court from the hour of 12 o'clock M., until the hour of 2 o'clock P. M., of this day, this cause having again been called for further hearing, and counsel and shorthand reporter being present as before; and complainants' motion for temporary injunction and application for appointment of a receiver having been argued, in support thereof, by Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States, and in opposition thereto by Joseph D. Redding,

Esq. and Peter F. Dunne, of counsel for defendants Lost Hills Mining Company and Universal Oil Company, and in support thereof in reply by Frank Hall, Esq., Special Assistant to the U. S. Attorney General, of counsel for the United States; it is, on motion and by agreement of counsel, ordered that this cause be, and the same hereby is submitted to the Court for its consideration and decision on complainants' motion for an injunction *pendente lite* and application for the appointment of a receiver, and upon the pleadings, testimony, exhibits, affidavits filed and to be filed, and upon briefs which may be prepared, served and filed by the respective parties as follows, to wit: On behalf of defendants within ten [83] (10) days, and on behalf of complainants within ten (10) days thereafter, the clerk of this court being directed to prepare a list of exhibits filed herein, furnishing to the Court, complainants and defendants one (1) copy each. [84]

At a special term, to wit, the special October Term, A. D. 1916, of the District Court of the United States for the Southern District of California, Northern Division, held at the courtroom thereof, in the City of Fresno, California, on Wednesday, the 4th day of October, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable ROBERT S. BEAN, District Judge.

No. A-57—EQUITY.

THE UNITED STATES OF AMERICA,

Complainants,

vs.

LOST HILLS MINING COMPANY et al.,

Defendants.

**Minutes of Court—October 4, 1916—Order Granting
Motion for Application for Appointment of
Receiver, etc.**

This cause having heretofore been submitted to the Court for its consideration and decision on a motion for the issuance of an injunction *pendente lite* herein and on an application for the appointment of a receiver; the Court, having duly considered the same and being fully advised in the premises, now reads its conclusions herein and regarding the matters under submission herein and in causes Nos. A-37—Equity and A-52—Equity, N. D., which conclusions are not at this time filed, and, pursuant to the Court's ruling in said conclusions, it is ordered that the motion of complainants for the issuance of an injunction *pendente lite* be, and the same hereby is denied, and it is further ordered that complainants' application for the appointment of a receiver be, and the same hereby is granted for all properties in controversy included in said application for appointment of a receiver except the south half (S. 1/2) of section 32, township 26 south, range 21 east, M. D. B. & M., and order accordingly to be prepared and presented by counsel for signature and entry. [85]

*In the District Court of the United States, for the
Southern District of California, Northern Division,
Ninth Circuit.*

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants.

Order Appointing Receiver.

This suit coming on to be heard on motion of the complainant for the appointment of a receiver and for an injunction, and having been heard on the 21st, 22d, 23d, 24th, 25th, 28th and 29th days of August, 1916,—

IT IS NOW CONSIDERED, ORDERED AND ADJUDGED that Howard M. Payne be, and he is hereby appointed a receiver,—and until the further order of this Court,—for certain of the properties described in the bill of complaint and herein claimed by the defendants, to wit:

Southwest quarter (SW. $\frac{1}{4}$) of Section Eighteen (18), Township Twenty-six (26) South, Range Twenty-one (21), East, Mount Diablo Meridian, and situated in Kern County, California,

and of the oil and gas already extracted and still in the possession of the defendants, Lost Hills Mining Company and Universal Oil Company.

IT IS FURTHER ORDERED that the receiver keep an accurate account of the quantity and quality of oil and gas hereafter produced if any from said lands herein described and until the further order of this court, that he dispose of and sell the [86] same at the best price or prices obtainable.

Until the further order of this Court the said defendants Universal Oil Company and Lost Hills Mining Company are hereby permitted to continue the operation and management of the properties hereinbefore described, and no change is to be made in the present status, management, or method of operation of said properties—by the receiver—without the consent of the said defendants, Universal Oil Company and Lost Hills Mining Company or by order of the Court made after ten days notice to the said defendants, other than such as may be necessary to enable said receiver to ascertain the present condition of the said properties and to receive and dispose of any output thereof and to keep a record and account thereof.

IT IS FURTHER ORDERED that the said Universal Oil Company shall render to the said receiver as soon as practicable after the first of each and every month, a statement of any expenses of the management and operation of said properties for preceding month, and the said receiver shall out of the proceeds of the sale of any oil and gas from said properties hereinbefore described pay to the said Universal Oil Company, forthwith the amount of said expenses of operating and managing said properties as set forth in said statement.

The receiver shall, within ten days after the settlement with the said Universal Oil Company for expenditures made for the preceding month, make and file with the clerk of this court a report setting forth the quality and quantity of the oil and gas, if any, disposed of and the price received therefor, and a statement of the expenses of the operation and management of the properties for the preceding month, and at such time such recommendations as he may deem advisable to the Court respecting the management and operation of said property, provided that no recommendation made to the Court in reference to the properties [87] shall be acted upon by the Court without ten days' notice to both parties and an opportunity to be heard thereon; a copy of said report and recommendations shall be delivered to the solicitors of the parties herein.

IT IS FURTHER ORDERED AND PROVIDED that the said receiver shall, at all reasonable times, have ingress to and egress from said properties for the purpose of examining the same, and with such assistance as may be reasonable so to do. The receiver shall also have full access, at all reasonable times, to the books of accounts, and records and logs of wells of the said Universal Oil Company with reference to said properties.

In the event the complainant herein desires to make an examination of the said property and the wells in addition to the examination herein provided to be made by such receiver, it shall be permitted to make such examination at its own expense.

IT IS FURTHER ORDERED that a bond in the sum of One Thousand Dollars (\$1,000.00) to be approved by this Court shall be given by the receiver within fifteen days from the filing of this order; provided the solicitors for the complainant or for the defendants, or either of them, may at any time upon one day's notice to counsel for the opposite parties, apply to the Court for an increase in the amount of the said bond.

Any moneys coming into the hands of the said receiver shall be deposited in The Bank of California, The National Association, in the city of San Francisco, State of California, and shall draw interest at the rate of at least three per cent per annum and shall be deposited in the name of said receiver and shall remain in said bank subject to the further order of this Court, both as to the amounts of money so deposited and the accumulation of interest thereon; provided that if said bank declines or refuses such rate of interest, then said moneys may be deposited in some other bank to be agreed upon by the parties [88] or to be designated by the Court; provided that the said receiver from the moneys received by him each month from the sale and disposition of oil and gas from said properties may deposit in a bank and in a noninterest-bearing account so much of said funds as may be necessary to pay the monthly operating and management expenses and the monthly current expenses of the receiver in the execution of this order; provided that said receiver shall not have on hand at any one time moneys in excess of One Thousand Dollars (\$1,000.00) which

are not deposited in The Bank of California, The National Association, in said interest-bearing account as aforesaid.

The amount of compensation to be paid to the receiver in this suit is to be determined hereafter, but in no event shall said sum, paid as compensation for services to the receiver in this action, together with such sums as may be paid said receiver for services as receiver of other oil and gas properties in suits brought in this court similar to this suit exceed the sum of Five Thousand Dollars per annum.

Done in open court this 20th day of December, 1916.

R. S. BEAN.

[Endorsed]: In Equity—A-57. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Lost Hills Mining Company and Universal Oil Company, Defendants. Order Appointing Receiver. Filed Dec. 20, 1916. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, San Francisco, California. [89]

*In the District Court of the United States, for
the Southern District of California, Northern
Division, Ninth Circuit.*

IN EQUITY—No. A-57.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,
Defendants.

**Petition for Appeal by the Lost Hills Mining
Company, a Corporation, and the Universal
Oil Company, a Corporation.**

The above-named defendants, Lost Hills Mining Company, a corporation, and Universal Oil Company, a corporation, feeling themselves aggrieved by the order and decree made on the 20th day of December, 1916, in the above-entitled case, wherein the above-entitled court made its order appointing Howard M. Payne receiver of those certain properties and lands, to wit: The southwest quarter (SW.1/4) of section eighteen (18), township twenty-six (26) south, range twenty-one (21) east, Mount Diablo Meridian, and situated in Kern County, California, involved in the above-entitled action, do hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons, and upon the grounds, specified in the assignment of errors, which is filed

herewith. Said defendants pray that this appeal may be allowed, and that a transcript of the record, proceedings, and papers upon which such order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 15th, 1917.

JOSEPH. D. REDDING,

MORRISON, DUNNE & BROBECK,

Solicitors for Defendants and Appellants, the Lost Hills Mining Company and the Universal Oil Company.

OSCAR SUTRO,

Of Counsel. [90]

[Endorsed]: In Equity—A-57. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Lost Hills Mining Company and Universal Oil Company, Defendant. Petition for Appeal by the Lost Hills Mining Company, a Corporation, and the Universal Oil Company, a Corporation. Service of the within petition for appeal is hereby acknowledged this 15th day of January, 1917. E. J. Justice, Albert Schoonover, Frank Hall, Attorneys for Appellees. Filed Jan. 16, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, Attorneys for Defendants and Appellants, Crocker Building, San Francisco. [91]

30072-17.

*In the District Court of the United States, for
the Southern District of California, Northern
Division, Ninth Circuit.*

IN EQUITY—No. A-57.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants.

Undertaking on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That the undersigned, the United States Fidelity &
Guaranty Company, a corporation, duly organized
and existing and doing business under and by virtue
of the laws of the State of Maryland is held and
firmly bound unto the above-named respondent, the
United States of America, in the sum of Five Hun-
dred Dollars (\$500.00) to be paid to said United
States of America, for the payment of which, well
and truly to be made, the undersigned binds itself,
its successors and assigns firmly by these presents.

IN WITNESS WHEREOF, The said United
States Fidelity & Guaranty Company has caused
this obligation to be signed by its duly authorized
attorney in fact, and its corporate seal to be hereunto
affixed at San Francisco, California, this 15th day
of January, A. D. 1917.

The condition of this bond is such that whereas the above-named defendants, Lost Hills Mining Company, a corporation and Universal Oil Company, a corporation, have prosecuted an appeal to the United States Circuit Court of Appeals, Ninth Circuit, to reverse the decree and order made in the above-entitled [92] action on the 20th day of December, 1916, appointing Howard M. Payne receiver of certain properties of the said defendants by the District Court of the United States, for the Southern District of California, Northern Division.

NOW, THEREFORE, the condition of this obligation is such that if the above-named Lost Hills Mining Company, a corporation, and Universal Oil Company, a corporation, shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

UNITED STATES FIDELITY & GUAR-
ANTY COMPANY,

[Seal]

By H. B. D. JOHNS,

Attorney in Fact.

By W. S. ALEXANDER,

Attorney in Fact.

Approved.

M. T. DOOLING,

Judge.

[Endorsed]: In Equity—A-57. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Lost Hills

Mining Company and Universal Oil Company, Defendants. Undertaking on Appeal. Filed Jan. 16, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, Attorneys for Defendants and Appellants, Crocker Bldg., San Francisco. [93]

*In the District Court of the United States, for
the Southern District of California, Northern
Division, Ninth Circuit.*

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants.

Order Allowing Appeal.

On motion of Joseph D. Redding, Esq., one of the solicitors for the defendants, the Lost Hills Mining Company, a corporation, and the Universal Oil Company, a corporation, and on filing the petition of said defendants for an order allowing an appeal, together with an assignment of errors and a prayer for the reversal of the order appointing a receiver,—

IT IS HEREBY ORDERED that an appeal be, and is hereby, allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the order given and made on the 20th day of December,

1916, and filed in the District Court of the United States for the Southern District of California, Northern Division, appointing Howard M. Payne as receiver to take charge of the property of said defendants, and each of them.

IT IS FURTHER ORDERED that a transcript of the record, proceedings, papers and exhibits upon which said order was made, duly authenticated and certified, be forthwith transmitted to said United States Circuit Court of Appeals for the Ninth Circuit.

IT IS FURTHER ORDERED that the bond on appeal be fixed at Five Hundred (\$500.00), to be approved by the Court.

Dated January 15, 1917.

M. T. DOOLING,
District Judge. [94]

[Endorsed]: In Equity—A-57. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Lost Hills Mining Company and Universal Oil Company, Defendants. Order Allowing Appeal. Service of the within order allowing appeal is hereby acknowledged this 15th day of January, 1917. E. J. Justice, Albert Schoonover, Frank Hall, Attorneys for Appellees. Filed Jan. 16, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, Attorneys for Defendants and Appellants, Crocker Bldg., San Francisco. [95]

*In the District Court of the United States for the
Southern District of California, Northern Division,
Ninth Circuit.*

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOST HILLS MINING COMPANY, and UNIVERSAL OIL COMPANY,

Defendants.

Assignment of Errors on Appeal of the Lost Hills Mining Company, a Corporation, and the Universal Oil Company, a Corporation, Defendants, and Prayer for Reversal of Order Appointing Receiver.

Now come the Lost Hills Mining Company, a corporation, and the Universal Oil Company, a corporation, and having prayed for an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the order and decree of the above-entitled United States District Court made on the 20th day of December, 1916, wherein and whereby one Howard M. Payne was appointed Receiver of the following described property, to wit: Southwest quarter (SW. $\frac{1}{4}$) of section eighteen (18), township twenty-six (26) south, range twenty-one (21) east, Mount Diablo meridian, and situated in Kern County, California, respectfully represent as grounds of appeal and as assignment of errors herein, and do hereby assign that the above-entitled

United States District Court erred in the following particulars:

I.

That the United States District Court erred in making said order and in appointing said receiver.
[96]

II.

That said District Court erred in making said order in this that said Court had not, nor had the Judge thereof, any jurisdiction to make said order appointing said receiver.

III.

That said District Court erred in not granting the motion of defendants to dismiss the bill of complaint herein.

IV.

That said District Court erred in holding that said District Court had any jurisdiction to try any of the issues involved in the above-entitled action.

V.

That said District Court erred in refusing to grant the motion of defendants to dismiss the bill of complaint on the ground that the sole jurisdiction to determine the issues involved in said action was, at all times since the commencement of this action, and still is, in the General Land Department of the United States.

VI.

That said District Court erred in holding that the General Land Department of the United States to whom application had been made for a patent to the lands involved in said action, did not have exclusive

jurisdiction to determine all the issues involved in the above-entitled action.

VII.

That said District Court erred in retaining jurisdiction of the subject matter of said suit and in appointing said receiver for the reason that the General Land Department of the United States had exclusive jurisdiction to determine all issues in said suit

VIII.

That said District Court erred in not holding that the [97] General Land Office before whom application for patent to the aforesaid lands were pending was the only tribunal competent and having power and jurisdiction to pass upon the issues involved in the above-entitled action.

IX.

That said District Court erred in holding that it had jurisdiction to determine the question of title to the lands involved in this action when it affirmatively appeared that patent had been applied for by defendants to the lands involved in this action, and there was pending an undetermined contest in the General Land Department of the United States.

X.

That said District Court erred in refusing to grant the motion of said defendants to dismiss the bill of complaint on the ground that the Court had no jurisdiction to try the issues involved in said suit for the reason that the defendant, Lost Hills Mining Company, had duly made and filed its application for patent to said lands in the proper land office of the United States, at Visalia, California, wherein

and whereby it did apply to the United States of America, and to the General Land Department thereof in accordance with the laws of the United States of America, and the rules and regulations of the Department of the Interior in reference thereto, which said application for patent was, at the time of the making of said order appointing said receiver, to wit, on the 20th day of December, 1916, and at the time of the hearing of said motion of said defendants to dismiss said bill of complaint and of the motion for a receiver, to wit, on the 21st, 22d, 23d, 24th, 25th, 28th and 29th days of August, 1916, still pending in the Land Department of the United States and undetermined and the evidence upon the hearings of said application for said patent was not yet in process of being taken in the General Land Department of the United States.

[98]

XI.

That said District Court erred in refusing to grant the motion of the said defendants to dismiss said action, and furthermore erred in making said order in appointing a receiver in this that the said Court never has had, and has not at the present time, any jurisdiction of the subject matter of this action.

XII.

That said District Court erred in holding and in construing the above-entitled action as one brought for ancillary relief.

XIII.

That said District Court erred in holding that upon the complaint filed in the above-entitled action,

it had jurisdiction to grant relief by the appointment of a receiver as ancillary to the proceedings in the General Land Department of the United States.

XIV.

That the said District Court erred in not holding that it had no jurisdiction to grant the ultimate relief asked for in the bill of complaint, and therefore that it had no jurisdiction to grant ancillary relief by the appointment of a receiver.

XV.

That said District Court erred in appointing a receiver upon the bill of complaint as filed and regarding the action as ancillary to the proceedings in the Land Department, whereas this action, as a matter of fact, was and is in opposition to and in disregard of the proceedings in the Land Department.

XVI.

That said District Court erred in making said order appointing said receiver in this that said Court abused its discretion and committed an abuse of discretion in making said order. [99]

XVII.

That said District Court erred in making said order in that the complaint of plaintiff in said action did not show facts justifying the appointment of a receiver.

XVIII.

That said District Court erred in directing the receiver to take charge of the oil and gas produced from said lands and to dispose of the same.

XIX.

That said District Court erred in holding that the

complainant was not amply protected as to all of its rights in the General Land Department of the United States by reason of the application for patent to said lands involved herein on the part of the defendant, Lost Hills Mining Company, herein, and the application on the part of the defendants, Lost Hills Mining Company, a corporation, and Universal Oil Company, a corporation, for leases under the terms and provisions of the Act of Congress of August 25th, 1914, entitled "An Act to Amend an Act Entitled 'An act to Protect the Locators in Good Faith of Oil and Gas Land Who Shall Have Effected an Actual Discovery of Oil or Gas on the Public Lands of the United States, or Their Successors in Interest,' Approved March 2d, 1911."

XX.

That said District Court erred in making said decree and order appointing a receiver in said action in that the complaint contains no allegation that the properties in question have been, or are being mismanaged, nor was any evidence introduced, nor did the Court hold that the said properties have not been, or are not being properly and economically managed, and furthermore the complaint in this action does not allege, nor did the evidence offered at the hearing of said application show, or tend to show, that any of the defendants are insolvent, nor [100] was any evidence offered or introduced to show, nor did the Court hold that in the management and operation of said properties said defendants conducted such management and the operation in any manner different from the management and

operation thereof as the same could, would or should be conducted by a receiver who might be appointed in the premises.

XXI.

That said District Court erred in appointing said receiver in that there was no evidence whatsoever introduced showing any necessity for the appointment of a receiver in the above-entitled action, or that any property whatsoever was being wasted or any oil or gas being taken from the land involved in the above-entitled action.

XXII.

That said District Court erred in making said order and decree in that said order is against the evidence presented at the hearing of said motion for a receiver.

XXIII.

That said District Court erred in making said order and decree appointing said receiver in that said order and decree is against law.

WHEREFORE the defendants, Lost Hills Mining Company, a corporation, and Universal Oil Company, a corporation, pray that said order appointing said receiver herein may be directed to be expunged from the records of said District Court for want of jurisdiction in said court to give and make said order appointing a receiver, and that the order appointing said receiver be corrected and reversed and the receiver discharged, and all properties received by said receiver from these defendants be returned to them; in order that the foregoing assignment of errors may be and appear of record

the defendants above named present the same to this Court and pray that such disposition may be made thereof as by the law and statutes of the United States in such case [101] made and provided.

Dated January 15th, 1917.

JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants.

OSCAR SUTRO,
Of Counsel.

[Endorsed]: In Equity—A-57. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Lost Hills Mining Company and Universal Oil Company, Defendants. Assignment of Errors on Appeal. Service of the within assignment of errors is hereby acknowledged this 15th day of January, 1917. E. J. Justice, Albert Schoonover, Frank Hall, Attorneys for Appellees. Filed Jan. 16, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, Attorneys for Defendants and Appellants, Lost Hills Mining Co. and Universal Oil Company, Crocker Building, San Francisco. [102]

*In the District Court of the United States, for
the Southern District of California, Northern
Division, Ninth Circuit.*

IN EQUITY—No. A-57.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,
Defendants.

Stipulation Re Allowance of Appeal.

IT IS HEREBY STIPULATED between the parties hereto that the petition for appeal and assignment of errors in the above-entitled action may be presented for allowance by the defendants, the Lost Hills Mining Company, a corporation, and the Universal Oil Company, a corporation, to the Honorable Maurice T. Dooling, regularly sitting by special assignment in the above-entitled court in special session held in the city and county of San Francisco, State of California, and that said Honorable Maurice T. Dooling may sign and allow said appeal, while sitting as aforesaid by special assignment in said special session in said city and county of San Francisco, State of California, and may sign the order allowing the appeal and the citation of appeal and approve the bond furnished by said defendants on appeal, and

IT IS FURTHER STIPULATED that no objection or advantage shall be taken of the fact that the Court is holding special session in the city and county of San Francisco, State of California, and that the said appeal and the allowance thereof are presented and allowed by a Judge of said court, other than the Judge who made the order from which this appeal is taken.

Dated January 15th, 1917. [103]

JOSEPH D. REDDING,

MORRISON, DUNNE & BROBECK,

Solicitors for the Lost Hills Mining Company and
the Universal Oil Company, Defendants and
Appellants.

OSCAR SUTRO,

Of Counsel.

E. J. JUSTICE,

ALBERT SCHOONOVER,

FRANK HALL,

Solicitors for Complainant and Respondent.

[Endorsed]: In Equity—A-57. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Lost Hills Mining Company and Universal Oil Company, Defendants. Stipulation on Appeal. Filed Jan. 16, 1917. Wm. M. Van Dyke, Clerk. By Leslie S. Colyer, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, Attorneys for Defendants and Appellants, Crocker Bldg., San Francisco. [104]

*In the District Court of the United States for the
Southern District of California, Northern Divi-
sion, Ninth Circuit.*

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,
Defendants and Appellants.

**Stipulation and Order Enlarging Time to and
Including March 18, 1917, for Filing of State-
ment of Evidence.**

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective solicitors, in the above-entitled cause, that the defendants and appellants, Lost Hills Mining Company and Universal Oil Company, each a corporation, may have up to and including the 18th day of March, 1917, within which to file for approval its statement of the evidence to be included in the record on appeal, as provided for in Equity Rule No. 75, and that the plaintiff and appellee may have ten days from and after receiving notice of the filing of said statement of evidence with the clerk of the above-entitled court within which to file objections and proposed amendments thereto.

Dated February 13, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,

Special Assistant to the Attorney General,
A. E. CAMPBELL,
Special Assistant to the Attorney General.

FRANK HALL,
Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.

JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants.

It is ordered.

M. T. DOOLING,
District Judge. [105]

[Endorsements]: Original. In Equity—No. A-57. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Lost Hills Mining Company and Universal Oil Company, Defendants. Stipulation Enlarging Time for Filing Statement of Evidence. Filed Feb. 16, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Joseph D. Redding, and Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Solicitors for Defendants. [106]

*In the District Court of the United States for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants and Appellants.

**Stipulation and Order Enlarging Time to and
Including May 18, 1917, for Filing of State-
ment of Evidence.**

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective solicitors, in the above-entitled cause, that the defendants and appellants, Lost Hills Mining Company and Universal Oil Company, each a corporation, may have up to and including the 18th day of May, 1917, within which to file for approval their statement of evidence to be included in the record on appeal, as provided for in Equity Rule No. 75, and that the plaintiff and appellee, may have ten days from and after receiving notice of the filing of said statement of evidence with the clerk of the above-entitled court within which to file objections and proposed amendments thereto.

Dated March 12, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,
Special Assistant to the Attorney General,
A. E. CAMPBELL,
Special Assistant to the Attorney General,
FRANK HALL,
Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.
JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants.

It is ordered.

M. T. DOOLING,
District Judge. [107]

[Endorsed]: Original. In Equity—No. A-57.
In the District Court of the United States, for the
Southern District of California, Northern Division,
Ninth Circuit. United States of America, Plain-
tiff, vs. Lost Hills Mining Company and Universal
Oil Company, Defendants. Stipulation and Order
Enlarging Time for Filing Statement of Evidence.
Filed Mar. 13, 1917. Wm. M. Van Dyke, Clerk.
By Chas. N. Williams, Deputy Clerk. Joseph D.
Redding, and Morrison, Dunne & Brobeck, Crocker
Building, San Francisco, Solicitors for Defendants.
[108]

*In the District Court of the United States for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,
Defendants and Appellants.

**Stipulation and Order Enlarging Time to and
Including July 18, 1917, for Filing of Statement
of Evidence.**

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective solicitors, in the above-entitled cause, that the defendants and appellants, Lost Hills Mining Company and Universal Oil Company, each a corporation, may have up to and including the 18th day of July, 1917, within which to file for approval their statement of evidence to be included in the record on appeal, as provided for in Equity Rule No. 75, and that the plaintiff and appellee may have ten days from and after receiving notice of the filing of said statement of evidence with the clerk of the above-entitled court within which to file objections and proposed amendments thereto.

Dated May 14th, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,

Special Assistant to the Attorney General,
A. E. CAMPBELL,

Special Assistant to the Attorney General,
FRANK HALL,

Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.

JOSEPH D. REDDING,

MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants.

It is ordered.

M. T. DOOLING,
District Judge. [109]

[Endorsements]: In Equity—A-57. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff and Appellee, vs. Lost Hills Mining Company and Universal Oil Company, Defendants and Appellants. Stipulation Enlarging Time for Filing Statement of Evidence. Filed May 15, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, Attorneys for Defendants and Appellants, Crocker Building, San Francisco. [110]

*In the District Court of the United States for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants and Appellants.

**Stipulation and Order Enlarging Time to and
Including September 18, 1917, for Filing of
Statement of Evidence.**

IT IS HEREBY STIPULATED by and between the parties hereto by their respective solicitors, in the above-entitled cause, that the defendants and appellants, Lost Hills Mining Company and Universal Oil Company, each a corporation, may have up to and including the 18th day of September, 1917, within which to file for approval their statement of evidence to be included in the record on appeal, as provided for in Equity Rule No. 75, and that the plaintiff and appellee may have ten days from and after receiving notice of the filing of said statement of evidence with the clerk of the above-entitled court within which to file objections and proposed amendments thereto.

Dated July 6th, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,

Special Assistant to the Attorney General,
FRANK HALL,
Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.

JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants.

It is ordered.

WM. M. MORROW,
District Judge. [111]

[Endorsed]: In Equity—No. A-57. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Ptf. and Appellee, vs. Lost Hills Mining Company and Universal Oil Company, Dfts. and Appellants. Stipulation Enlarging Time for Filing Statement of Evidence. Filed Jul. 14, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Joseph D. Redding, Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., Solicitors for Defendants and Appellants. [112]

*In the District Court of the United States for the
Southern District of California, Northern Di-
vision, Ninth Circuit.*

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,
Defendants and Appellants.

**Stipulation and Order Enlarging Time to and
Including November 18, 1917, for Filing of
Statement of Evidence.**

IT IS HEREBY STIPULATED by and between the parties hereto by their respective solicitors, in the above-entitled cause, that the defendants and appellants, Lost Hills Mining Company and Universal Oil Company, each a corporation, may have up to and including the 18th day of November, 1917, within which to file for approval their statement of the evidence to be included in the record on appeal, as provided for in Equity Rule No. 75, and that the plaintiff and appellee may have ten days from and after receiving notice of the filing of said statement of evidence with the clerk of the above-entitled court within which to file objections and proposed amendments thereto.

Dated September 10, 1917.

ALBERT SCHOONOVER,
United States Attorney,

HENRY F. MAY,

Special Assistant to the Attorney General,

FRANK HALL,

Special Assistant to the Attorney General,

Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.

JOSEPH D. REDDING,

MORRISON, DUNNE & BROBECK,

Solicitors for Defendants and Appellants.

It is ordered.

WM. H. HUNT,
Judge. [113]

[Endorsed]: In Equity—No. A-57. In the District Court of the United States, for the Southern District of California, Northern Division, Ninth Circuit. United States of America, Plaintiff, vs. Lost Hills Mining Company and Universal Oil Company, Defendants. Stipulation Enlarging Time for Filing Statement of Evidence. Filed Sep. 14, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Joseph D. Redding and Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Solicitors for Defendants. [114]

*In the District Court of the United States for the
Southern District of California, Northern Di-
vision.*

IN EQUITY—No. A-37.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DEVIL'S DEN CONSOLIDATED OIL COM-
PANY, ASSOCIATED OIL COMPANY and
STANDARD OIL COMPANY,
Defendants.

IN EQUITY—No. A-52.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOST HILLS MINING COMPANY, UNIVER-
SAL OIL COMPANY and ASSOCIATED
OIL COMPANY,
Defendants.

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,
Defendants.

Stipulation for but One Transcript of the Record and Statement of Evidence on Appeal, as to the Use Thereof on Appeal, and for the Time of Filing of Statement of Evidence.

IT IS HEREBY STIPULATED and agreed by and between the parties in the above-entitled causes, by their respective counsel, [115] that in perfecting the record for appeals of the above-entitled causes, to the United States Circuit Court of Appeals, only one record of the statement of the evidence to be incorporated in the record on appeal, shall be required, to wit, the statement of the evidence in case No. A-52; such record to include such of the clerk's records in each of said within causes as desired by either of the parties; and one statement of the evidence introduced upon the hearing of the application for a receiver in said causes, the same having been at that time consolidated for said hearing, and such record when so approved may be used by the defendants, or either of them, or by the plaintiff as the record on appeal in either or all of such causes, when and where applicable and relevant.

IT IS FURTHER STIPULATED by and between the parties in the above-entitled causes that the defendants therein may have until the 30th day of October, 1917, within which to file for approval its statement of the evidence to be included in the

record on appeal as provided for in equity rule No. 75.

JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants.

ROBERT O'CONNOR,
United States Attorney,

HENRY F. MAY,

FRANK HALL,

Special Assistants to the Attorney General,
Solicitors for the Plaintiff and Appellee. [116]

[Endorsed]: In the District Court of the United States for the Southern District of California, Northern Division. United States of America, Plaintiff, vs. Devil's Den Consolidated Oil Co. et al., Defendants. No. A-37. United States of America, Plaintiff, vs. Lost Hills Mining Company et al., Defendants. No. A-52. United States of America, Plaintiff, vs. Lost Hills Mining Company et al., Defendants. No. A-57. Stipulation for but One Transcript of the Record and Statement of Evidence on Appeal, as to the Use Thereof on Appeal, and for the Time of Filing of Statement of Evidence. Filed Oct. 18, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Joseph D. Redding and Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., Solicitors for Defendants. [117]

*In the District Court of the United States, for the
Southern District of California, Northern Division,
Ninth Circuit.*

Honorable ROBERT S. BEAN, Judge Presiding.

IN EQUITY—No. A-37.

UNITED STATES OF AMERICA,
Complainant,

vs.

DEVIL'S DEN CONSOLIDATED OIL COM-
PANY, et al.,

Defendants.

IN EQUITY—No. A-52.

UNITED STATES OF AMERICA,
Complainant,

vs.

LOST HILLS MINING COMPANY, UNIVER-
SAL OIL COMPANY and ASSOCIATED
OIL COMPANY,

Defendants.

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,
Complainant,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants.

Stipulation for Approval of Statement of Evidence.

[118]

IT IS STIPULATED by and between the parties to this cause, through their respective solicitors, that the foregoing statement of evidence may be approved by the Court or Judge, as the statement of evidence to be used for the purposes of defendants' appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit under Rule 75 of the "Rules of Practice for the Courts of Equity of the United States," and the complainant (United States of America) hereby expressly waives its right to have the statement of the evidence first lodged in the clerk's office for its examination, and further waives its right to the ten days' notice of the time and place when and where the defendants will ask the Court or Judge to approve the same, as provided in and by said Rule 75.

ROBERT O'CONNER,

United States District Attorney.

HENRY F. MAY,

Special Assistant to the Attorney General,

FRANK HALL,

Special Assistant to the Attorney General, Solicitors
for Complainant.

JOSEPH D. REDDING,

MORRISON, DUNNE & BROBECK,

Solicitors for Defendants. [119]

[Endorsed]: A-37—Eq. In the District Court of
the United States, for the Southern District of Cali-

fornia, Northern Division, Ninth Circuit. United States of America vs. Devil's Den Consolidated Oil Company et al. In Equity—No. A-37. United States of America vs. Lost Hills Mining Company et al., In Equity—Nos. A-52, A-57. Filed Oct. 1, 1917. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Albert Schoonover, U. S. Dist. Atty. Frank Hall, Henry F. May, Special Assistants to the Attorney General, Solicitors for Complainant. Joseph D. Redding, Morrison, Dunne & Brobeck, Solicitors for Defendants. [120]

*In the District Court of the United States for the
Southern District of California, Northern Division.*

A-57.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY, Corporations,
Defendants.

**Notice of Election by Defendants, Lost Hills Mining
Company and Universal Oil Company, as to
Printing of Record.**

The Lost Hills Mining Company and Universal Oil Company, corporations, being the appellants in the above-entitled cause from an order of said Court to the United States Circuit Court of Appeals for the Ninth Circuit, hereby give notice that they

elect to take and file in the said Appellate Court, to be printed under the supervision of its clerk, under its rules, a transcript of such portions of the record as may be duly settled under Rule 75 of the "Rules of Practice for the Courts of Equity of the United States," duly authenticated, and also in accordance with the stipulation heretofore filed in this cause employing the record of the transcript of proceedings in the case A-52 as provided in said stipulation.

Dated Oct. 16th, 1917.

JOSEPH D. REDDING,

MORRISON, DUNNE & BROBECK,

Solicitors for Defendants and Appellants. [121]

[Endorsed]: A-57. In the District Court of the United States, for the Southern District of California, Northern Division. United States of America, Plaintiff, vs. Lost Hills Mining Company and Universal Oil Company, Defendants. Notice of Election by Defendants as to Printing of Record. Filed Oct. 18, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Joseph D. Redding and Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., Solicitors for Defendants. [122]

*In the District Court of the United States, for the
Southern District of California, Northern Division.*

IN EQUITY—No. A-57.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants.

**Praeipce for Transcript on Appeal by Defendants
Lost Hills Mining Company and Universal Oil
Company, Corporations.**

To William M. Van Dyke, Clerk of the District Court
of the United States for the Southern District
of California, Northern Division:

Please prepare and duly authenticate for the appeal of the defendants, Lost Hills Mining Company and Universal Oil Company, corporations, to the United States Circuit Court of Appeals for the Ninth Circuit from the order appointing a receiver in the above-entitled suit entered on December 21, 1916, a transcript incorporating the following portions of the record therein and none other:

1. Bill of Complaint.
2. Answer of Defendants Universal Oil Company and Lost Hills Mining Company to the Bill of Complaint.

3. Notice of Motion to Have the Jurisdictional Defense of the Defendants Separately Heard and Disposed of.
4. Notice of Motion for Restraining Order and Appointment of Receiver.
5. Hearing Orders Entered July 28th, 1916.
6. Three Motions Filed August 15, 1916, and Orders Thereon. [123]
7. Orders on Hearing August 16, August 17, August 21, August 22, August 23, August 24, August 25, August 28, August 29, 1916.
8. Hearing Order of October 4, 1916.
9. Order December 21, 1916, Appointing Howard M. Payne, Receiver.
10. The Petition of the Lost Hills Mining Company and Universal Oil Company for Their said Appeal.
11. Undertaking on Appeal.
12. Order Allowing Appeal.
13. Assignment of Errors for such Appeal.
14. The Orders of the Court or Judge Allowing Such Appeal.
15. The Citation Issued on Such Appeal Showing Service Thereof.
16. Each and All of the Several Stipulations Entered into Between Counsel Extending the Return Day of the Citation; Stipulations Extending the Time in Which the Statement of Evidence to be Incorporated in the Record on Appeal Shall be Filed; Stipulation With Reference to Consolidating the Record and Printing of One Transcript Thereof in

the Above-entitled Case, and also in A-37 and A-52; All Stipulations With Reference to Perfecting the Appeal in the Above-entitled Case.

17. Stipulation entered into in the above-entitled cause and also in A-52 for the Approval of Statement of Evidence.
18. Notice of Election by Defendants and Appellants as to Printing Record.
19. This Praecipe.

Dated Los Angeles, California, October 16th, 1917.

JOSEPH D. REDDING,

MORRISON, DUNNE & BROBECK,

Solicitors for Defendants and Appellants. [124]

[Endorsed]: In Equity—No. A-57. In the District Court of the United States, for the Southern District of California, Northern Division. United States of America, Plaintiff, vs. Lost Hills Mining Company and Universal Oil Company, Defendants. Praecipe for Transcript on Appeal. Filed Oct. 18, 1917. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Joseph D. Redding and Morrison, Dunne & Brobeck, Crocker Building, San Francisco, Cal., Solicitors for Defendants. [125]

In the District Court of the United States of America, in and for the Southern District of California, Northern Division.

IN EQUITY—No. A-57.

THE UNITED STATES OF AMERICA,
Complainants,
vs.

LOST HILLS MINING COMPANY, a Corporation,
and UNIVERSAL OIL COMPANY, a Corporation,
Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and twenty-five typewritten pages, numbered from 1 to 125, inclusive and comprised in one volume, to be a full, true and correct copy of the record, proceedings and papers upon which the order and decree made on the 20th day of December, 1916, in the above-entitled case, wherein the above-entitled court made its order appointing Howard M. Payne, receiver, and that the same together constitute the record in said cause as specified in the said praecipe filed in my office on behalf of appellants, Lost Hills Mining Company, a corporation and Universal Oil Company, a corporation, by their solicitors of record.

I do further certify that the cost of the foregoing record is \$43.10, the amount whereof has been paid me by [126] Lost Hills Mining Company, a corporation, and Universal Oil Company, a corporation, the appellants herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, this 14th day of December, in the year of our Lord one thousand nine hundred and seventeen and of our Independence the one hundred and forty-second.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [127]

[Endorsed]: No. 3096. United States Circuit Court of Appeals for the Ninth Circuit. Lost Hills Mining Company, a Corporation, and Universal Oil Company, a Corporation, Appellants, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed December 17, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants and Appellants,

VS.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

**Stipulation and Order Enlarging Time to and
Including March 18, 1917, to Return Citation.**

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective solicitors, in the above-entitled cause, which case is In Equity No. A-57, in the District Court of the United States for the Southern District of California, Northern Division, that the defendants and appellants, Lost Hills Mining Company and Universal Oil Company, may have up to and including the 18th day of March, 1917, within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit may be enlarged and extended up to and including said 18th day of March, 1917.

Dated February 13, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,
Special Assistant to the Attorney General,
A. E. CAMPBELL,
Special Assistant to the Attorney General,
FRANK HALL,
Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.
JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants.

Order.

This cause coming on to be heard upon the application of Lost Hills Mining Company and Universal Oil Company, defendants and appellants, for an enlargement of the return of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing that a stipulation by and between the parties has been filed herein providing that the return day on such citation may be extended up to and including the 18th day of March, 1917;

IT IS HEREBY ORDERED that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and the same hereby is enlarged and extended up to and including the 18th day of March, 1917.

Dated February 15, 1917.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: No. —. Original. In the United States Circuit Court of Appeals, Ninth Judicial Circuit. Lost Hills Mining Company and Universal Oil Company, Appellants, vs. United States of America, Appellee. Stipulation Enlarging Time to Return Citation and Order. Filed Feb. 15, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,
Defendants and Appellants,
vs.

UNITED STATES OF AMERICA,
Plaintiff and Appellee.

**Stipulation and Order Enlarging Time to and
Including May 18, 1917, to Return Citation.**

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective solicitors, in the above-entitled cause, which case is In Equity No. A-57, in the District Court of the United States for the Southern District of California, Northern Division, that the defendants and appellants, Lost Hills Mining Company and Universal Oil Company, may have up to and including the 18th day of May, 1917, within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and that the return day of the citation on appeal to the United States Circuit Court of Appeals

for the Ninth Circuit may be enlarged and extended up to and including said 18th day of May, 1917.

Dated March 12, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,

Special Assistant to the Attorney General,
A. E. CAMPBELL,

Special Assistant to the Attorney General,
FRANK HALL,

Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.

JOSEPH D. REDDING,

MORRISON, DUNNE & BROBECK,

Solicitors for Defendants and Appellants.

Order.

This cause coming on to be heard on application of the Lost Hills Mining Company and Universal Oil Company, defendants and appellants, for an enlargement of the return of citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for an extension of time within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing that a stipulation by and between the parties has been filed herein providing that the return day on such citation may be extended up to and including the 18th day of May, 1917, and that the appellants may have up to and including said 18th day of May, 1917, within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS HEREBY ORDERED that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby enlarged and extended up to and including the 8th day of May, 1917, and the said appellants are hereby given up to and including the said 18th day of May, 1917, within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 12, 1917.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: No. ——. Original. In the United States Circuit Court of Appeals, Ninth Judicial Circuit. Lost Hills Mining Company and Universal Oil Company, Appellants, vs. United States of America, Appellee. Stipulation Enlarging Time to Return Citation. Order. Filed Mar. 12, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

**Stipulation and Order Enlarging Time to and
Including July 18, 1917, to Return Citation.**

IT IS HEREBY STIPULATED by and between

the parties hereto, by their respective solicitors, in the above-entitled cause, which case is In Equity—No. A-57, in the District Court of the United States for the Southern District of California, Northern Division, that the defendants and appellants, Lost Hills Mining Company and Universal Oil Company, may have up to and including the 18th day of July, 1917, within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit may be enlarged and extended up to and including said 18th day of July, 1917.

Dated May 14th, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,

Special Assistant to the Attorney General,
A. E. CAMPBELL,
Special Assistant to the Attorney General,
FRANK HALL,

Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.

JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants.

Order.

This cause coming on to be heard on application of the Lost Hills Mining Company and Universal Oil Company, defendants and appellants, for an enlargement of the return of citation on appeal to the

United States Circuit Court of Appeals for the Ninth Circuit, and for an extension of time within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing that a stipulation by and between the parties has been filed herein providing that the return day on such citation may be extended up to and including the 18th day of July, 1917, and that the appellants may have up to and including said 18th day of July, 1917, within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS HEREBY ORDERED that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby enlarged and extended up to and including the 18th day of July, 1917, and the said appellants are hereby given up to and including the said 18th day of July, 1917, within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated May 14, 1917.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, Ninth Judicial Circuit. Lost Hills Mining Company and Universal Oil Company, Appellants, vs. United States of America, Appellee. Stipulation Enlarging Time to Return Citation and Order. Filed May 17, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

**Stipulation and Order Enlarging Time to and
Including September 18, 1917, to Return Cita-
tion.**

IT IS HEREBY STIPULATED by and between the parties hereto by their respective solicitors, in the above-entitled cause, which case is In Equity No. A-57, in the District Court of the United States for the Southern District of California, Northern Division, that the defendants and appellants, Lost Hills Mining Company and Universal Oil Company, may have up to and including the 18th day of September, 1917, within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit may be enlarged and

extended up to and including said 18th day of September, 1917.

ALBERT SCHOONOVER,
United States Attorney,
E. J. JUSTICE,

Special Assistant to the Attorney General,
FRANK HALL,
Special Assistant to the Attorney General,

Special Assistant to the Attorney General,
Solicitors for Plaintiff and Appellee.

JOSEPH D. REDDING,
MORRISON, DUNNE & BROBECK,
Solicitors for Defendants and Appellants.

Order.

This cause came on to be heard on application of the Lost Hills Mining Company and Universal Oil Company, defendants and appellants, for an enlargement of the return of citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for an extension of time within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing that a stipulation by and between the parties has been filed herein providing that the return day on such citation may be extended up to and including the 18th day of September, 1917, and that the appellants may have up to and including said 18th day of September, 1917, within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS HEREBY ORDERED that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby enlarged and extended up to and including the 18th day of September, 1917, and the said appellants are hereby given up to and including the said 18th day of September, 1917, within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated July 13, 1917.

WM. W. MORROW,
Circuit Judge.

[Endorsed]: In Equity. No. ——. In the United States Circuit Court of Appeals, Ninth Judicial Circuit. Lost Hills Mining Company and Universal Oil Company, Dfts. and Appellants, vs. United States of America, Ptf. and Appellee. Stipulation Enlarging Time to Return Citation. Order. Filed Jul. 13, 1917. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Defendants and Appellants,

vs.

UNITED STATES OF AMERICA,

Plaintiff and Appellee.

Stipulation and Order Enlarging Time to and Including November 18, 1917, to Return Citation.

IT IS HEREBY STIPULATED by and between the parties hereto, by their respective solicitors, in the above-entitled cause, which case is In Equity—No. A-57, in the District Court of the United States for the Southern District of California, Northern Division, that the defendants and appellants, Lost Hills Mining Company and Universal Oil Company, may have up to and including the 18th day of November, 1917, within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit may be enlarged and extended up to and including said 18th day of November, 1917.

Dated September 10, 1917.

ALBERT SCHOONOVER,

United States Attorney,

HENRY F. MAY,

Special Assistant to the Attorney General,

FRANK HALL,

Special Assistant to the Attorney General,

Special Assistant to the Attorney General,

Solicitors for Plaintiff and Appellee.

JOSEPH D. REDDING,

MORRISON, DUNNE & BROBECK,

Solicitors for Defendants and Appellants.

Order.

This cause coming to be heard on application of the Lost Hills Mining Company and Universal Oil Company, defendants and appellants, for an enlargement of the return of citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and for an extension of time within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, and it appearing that a stipulation by and between the parties has been filed herein providing that the return day on such citation may be extended up to and including the 18th day of November, 1917, and that the appellants may have up to and including said 18th day of November, 1917, within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit;

IT IS HEREBY ORDERED that the return day of the citation on appeal to the United States Circuit Court of Appeals for the Ninth Circuit be and the same is hereby enlarged and extended up to and including the 18th day of November, 1917, and the said appellants are hereby given up to and including the said 18th day of November, 1917, within which to file their transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 10, 1917.

WM. H. HUNT,
Circuit Judge.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, Ninth Judicial Circuit. Lost

Hills Mining Company and Universal Oil Company,
Dfts. and Appellants, vs. United States of America,
Ptf. and Appellee. Stipulation Enlarging Time to
Return Citation. Order. Filed Sep. 12, 1917. F.
D. Monckton, Clerk.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

In EQUITY—No. D. C. A-57.

LOST HILLS MINING COMPANY and UNI-
VERSAL OIL COMPANY,

Appellants,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

**Order Enlarging Time to December 18, 1917, to File
Record and Docket Cause Under Subdivision 1
of Rule 16.**

Upon application of Mr. Joseph D. Redding, coun-
sel for the appellants, and good cause therefor ap-
pearing, it is ORDERED that the return day of the
Citation on Appeal to the United States Circuit
Court of Appeals for the Ninth Circuit be, and the
same is hereby enlarged and extended to and includ-
ing the 18th day of December, 1917, and the said
appellants are hereby given up to and including the
said 18th day of December, 1917, within which to file
their Transcript of Record on Appeal, and docket the
above-entitled cause in this court.

San Francisco, California, November 7, 1917.

WM. H. HUNT,
United States Circuit Judge.

[Endorsed]: No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to and Including Dec. 18, 1917, to File Record Thereof and to Docket Case. Filed Nov. 7, 1917. F. D. Monckton, Clerk.

No. 3096. United States Circuit Court of Appeals for the Ninth Circuit. Six Orders Under Rule 16 Enlarging Time to December 18, 1917, to File Record Thereof and to Docket Case. Refiled Dec. 17, 1917. F. D. Monckton, Clerk.

No. 3096

United States Circuit Court of Appeals

For the Ninth Circuit

LOST HILLS MINING COMPANY, (a corporation), and UNIVERSAL OIL COMPANY, (a corporation), vs. THE UNITED STATES OF AMERICA,	}	<i>Appellants,</i> <i>Appellee.</i>
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BRIEF FOR APPELLANTS.

MORRISON, DUNNE & BROBECK,
JOSEPH D. REDDING,
*Attorneys for Defendants
and Appellants.*

Filed this.....day of February, A. D. 1918.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

United States Circuit Court of Appeals

LOST HILLS MINING COMPANY,
(a corporation), and
UNIVERSAL OIL COMPANY,
(a corporation), *Appellants,*

THE UNITED STATES OF AMERICA,
Appellee.

STATEMENT

This case, being number 3096 in this court, and A-57 in the court below (Tr. in 3096, p. 3) has the same parties as case numbered 3095 in this court, and A-52 in the court below (Tr. in 3095, p. 3). We have fully briefed number 3095, and it will not be necessary to repeat the discussion here, or to go farther than to point out a distinction of circumstance, not significant, as we view it, between case 3095 and the case now at bar, 3096. To begin with, there is, of course, a local difference in the property involved. Case 3096 is concerned with

the southwest quarter of section 18 in township 26 south, range 21 east, Mount Diablo Meridian,—in Kern County, California. In the next place, the bill in case 3096 was filed June 15, 1916, (Tr., p. 15). The answer was filed August 25, 1916, (Tr., p. 52). It sets up, like the answer in 3095, the pendency of the proceedings in the land department. But those proceedings, unlike the proceedings in the land department set up in 3095, were not begun prior to the filing of the bill of complaint. The patent application in 3096 came intermediately, between the filing of the bill and the filing of the answer. It was filed on July 10, 1916, (Tr. in 3096, p. 39; Tr. in 3095, p. 533).

The reference to page 533 of the transcript in 3095, is explained by the circumstance that, for reasons of convenience, a consolidated statement of the case was prepared for use on appeal in the two Lost Hills cases, numbered below A-52 and A-57 respectively, and, on appeal, 3095 and 3096 respectively, and in the Devils Den case, numbered A-37 below, and, on appeal, 3094 (Tr. in 3095, pp. 184, 185).

It is submitted that the filing of the application for patent, as alleged in the answer in 3096, and the pendency thereafter of the proceeding to acquire title in the Land Department, displaced any general jurisdiction of the court below. (*Cosmos Co. v. Grey Eagle Co.*, 190 U. S. p. 308, and other cases

cited in brief in 3095). The jurisdiction to determine the question of title was and is in the land department, and case 3096 must be ruled by the same principles as control case 3095.

Respectfully submitted,

MORRISON, DUNNE & BROBECK,
JOSEPH D. REDDING,

*Attorneys for Defendants
and Appellants.*

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,

Plaintiff in Error,

vs.

BARTHOLOMEW CHAMBERLAIN,

Defendant in Error.

Transcript of the Record

FILED

DEC 17 1907

F. D. MONCKTON

CL

*Upon Writ of Error from the United States District
Court for the District of Idaho,
Northern Division.*

No.

United States
Circuit Court of Appeals
For the Ninth Circuit

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,

Plaintiff in Error,

vs.

BARTHOLOMEW CHAMBERLAIN,

Defendant in Error.

Transcript of the Record

*Upon Writ of Error from the United States District
Court for the District of Idaho,
Northern Division.*

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Names and Addresses of Attorneys of Record

GEORGE W. KORTE, Esq.,

608 White Bldg., Seattle, Washington.

J. F. AILSHIE, Esq.,

Coeur d'Alene, Idaho.

Attorneys for Plaintiff in Error.

NORRIS & YATES,

St. Maries, Idaho.

CORKERY & CORKERY,

540 Rookery Bldg., Spokane, Washington.

Attorneys for Defendant in Error.

*In the District Court of the Eighth Judicial District
of the State of Idaho, in and for County
of Benewah.*

BARTHOLOMEW CHAMBERLAIN,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
ROAD COMPANY, a Corporation,

Defendant.

NOTICE OF PETITION FOR REMOVAL.

To the above named plaintiff, BARTHOLOMEW CHAMBERLAIN, and to NORRIS & YATES, St. Maries, Idaho, and CORKERY & CORKERY, Spokane, Washington, his Attorneys:

You and each of you are hereby notified that the defendant, Chicago, Milwaukee & St. Paul Railway Company, will, on the twenty-ninth day of January, 1917, file in the above named Court its petition for the removal of said cause to the District Court of the United States for the District of Idaho, Northern Division, sitting in the city of Coeur d'Alene, Idaho, and that it will, at the same time, make and file therewith a bond with good and sufficient surety for the entering in such District Court, within thirty days from the filing of said petition of a certified copy of the record in such suit and for the paying of all costs that may be awarded by said District Court, if said Dis-

trict Court shall hold that said suit was wrongfully or improperly removed thereto.

GEO. W. KORTE,

608 White Building, Seattle, Wash.

J. F. AILSHIE,

Coeur d'Alene, Idaho.

Filed January 29, 1917.

Warren T. Shepperd, Clerk.

By C. B. Moon, Deputy.

(Title of Court and Cause.)

PETITION FOR REMOVAL.

The petition of the above named defendant, CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, respectfully shows unto the Court:

That your petitioner, Chicago, Milwaukee & St. Paul Railway Company, was, at the time of the commencement of said suit and still is, a corporation organized and existing under and by virtue of the laws of the State of Wisconsin, and was, at the time of the commencement of said suit, and still is, a citizen and resident corporation of said State; that its principal place of business is the city of Milwaukee in said State of Wisconsin; that the plaintiff, Bartholomew Chamberlain, was, at the time of the commencement of said suit, and still is, a citizen and resident of the State of Idaho; that the above entitled suit is brought by said plaintiff to recover of said petitioner the sum of Fifteen Thousand One Hundred and Fifteen (\$15,115) Dollars, as damages

for personal injuries alleged to have been caused him through the negligence of your petitioner; that said suit is wholly of a civil nature; that there is a controversy in said suit which is wholly between citizens of different states, and that the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of Three Thousand (\$3,000) Dollars,—all of which will more fully appear by the complaint in said suit, which is hereby referred to and made a part hereof; that your petitioner disputes said claim and denies all liability thereon; that the time within which your petitioner is required by the laws of the State of Idaho and the rules and practice of said Court to answer and plead in said suit has not yet expired; that your petitioner desires to remove this suit before the trial thereof into the District Court of the United States for the proper district, and your petitioner offers and files herewith a bond with good and sufficient surety for its entering in said District Court within thirty days from the date of the filing of this petition, a certified copy of the record of this suit and for its paying all costs that may be awarded by said District Court, if said District Court shall hold that this suit has been improperly removed thereto.

WHEREFORE, your petitioner prays that said surety and bond be approved and accepted and that an order be entered removing said cause to the District Court of the United States for the District of Idaho, Northern Division, and that your petitioner be required to enter and file a copy of the record

herein in said District Court of the United States, as provided by law, and that this Court proceed no further in said cause.

GEO. W. KORTE,
608 White Building, Seattle, Wash.
J. F. AILSHIE,
Coeur d'Alene, Idaho.
Attorneys for Defendant.

State of Washington,
County of King,—ss.

George W. Korte, being first duly sworn, on oath says:

That he is the Attorney for the petitioner, Chicago, Milwaukee & St. Paul Railway Company, in the foregoing action; that he is authorized to make and execute this petition and does so on behalf of said petitioner; that he has read the foregoing petition, knows the contents thereof, and that the statements and allegations therein contained are true.

GEO. W. KORTE,

Subscribed and sworn to before me this 20th day of January, A. D. 1917.

(N. P. Seal)

M. C. MUMFORD,
Notary Public in and for the State of Washington,
residing at Seattle, therein.

Filed January 29, 1917.

Warren T. Shepperd, Clerk,
By C. B. Moon, Deputy.

(Title of Court and Cause.)

REMOVAL BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation, as *Principal*, and the NATIONAL SURETY COMPANY, of New York, as *Surety*, are held and firmly bound unto BARTHOLOMEW CHAMBERLAIN, the plaintiff in the above entitled action, in the penal sum of Five Hundred (\$500) Dollars, lawful money of the United States, to be paid to the plaintiff, his heirs, executors, administrators or assigns, for which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally firmly by these presents.

Sealed with our seals and dated this 19th day of January, 1917.

WHEREAS, the above entitled suit was brought on or about the 12th day of January, 1917, in the District Court of the Eighth Judicial District of the States of Idaho for the County of Benewah, by the plaintiff against the above named defendant, and is now pending in said State Court, and is removable into the District Court of the United States for the District of Idaho, Northern Division, and the said defendant, Chicago, Milwaukee & St. Paul Railway Company has petitioned said State Court for said removal.

NOW, THEREFORE, if the said defendant, Chicago, Milwaukee & St. Paul Railway Company, shall enter in the District Court of the United States for

the District of Idaho, Northern Division, within thirty (30) days from the date of the filing of the petition for removal, a certified copy of the record in said suit, and shall well and truly pay all the costs that may be awarded by said District Court, if it shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise, it shall be and remain in full force and effect.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,

By Geo. W. Korte, its Attorney.

NATIONAL SURETY COMPANY,

By L. H. Woolfolk,

Resident Vice-President.

(Seal of Surety Co.)

E. P. Welch,

Resident Assistant Secretary.

Filed January 29, 1917.

Warren T. Shepperd, Clerk,

By C. B. Moon, Deputy.

(Title of Court and Cause.)

ORDER REMOVING CAUSE TO UNITED
STATES DISTRICT COURT.

Upon reading the petition and bond for the removal of the above entitled suit and the whole thereof into the District Court of the United States for the District of Idaho, Northern Division, heretofore filed in the above entitled Court, and finding the said petition and bond sufficient in all respects, as pro-

vided by laws relating to the removal of causes from the State Court to the District Court of the United States, it is

ORDERED, that the said petition and bond be approved and accepted, and that the said suit and the whole thereof be, and the same is hereby, removed to the District Court of the United States for the District of Idaho, Northern Division, and the jurisdiction of this Court over said suit and the whole thereof be, and the same is hereby surrendered to the said United States Court, and that this Court proceed no further with said suit or any part thereof; that said defendant, Chicago, Milwaukee & St. Paul Railway Company, cause a certified copy of the record in said suit to be entered and filed in said United States Court within the time provided by law.

Signed in open Court this 29th day of January,
A. D. 1917.

JOHN M. FLYNN, Judge.

Filed January 30, 1917.

Warren T. Shepperd, Clerk.

(Title of Court and Cause.)

COMPLAINT.

Comes now the plaintiff and for his cause of action against the defendant alleges:

I.

That the defendant is and at all times herein mentioned has been, a corporation duly organized and

existing under and by virtue of the laws of the State of Wisconsin, and has filed its articles of incorporation with the Secretary of State of the State of Idaho, and has been and is doing business within the said State and maintains an office and transacts business in the County of Benewah of said State.

II.

That the defendant does now, and at all times hereinafter mentioned, owned, maintained and operated in the State of Idaho, a railway system as a common carrier of passengers for hire and in connection therewith, and for a long time prior to October 1st, 1916, owned, maintained and operated a regular depot and station at the town of Herrick, Idaho, together with a platform in connection with said depot for the use and convenience of passengers upon the trains thereof. And that said station, depot and platform were used for receiving and discharging passengers to and from the trains of defendant and was generally used by the public for such purpose; that said depot and platform at said point were constructed between a siding joining the main line just west of said depot and the main line at which points the tracks were elevated above the natural lay of the ground about ten (10) feet, and that said depot building was constructed upon posts about ten feet high, and the platform in connection therewith extended from said depot building proper out to the main line, a distance of about eleven feet; that on the west side of said depot building the platform was

extended from the main line to the said track for the purpose of transferring freight and baggage from the main line to said side track and completely bridged the low land between the side track and main line on the west side of said depot; that on or about the 1st day of October, 1916, defendant removed said depot building and that portion of the platform west of said building from said station to some other point along its line, but left the platform extending from said depot building to the main line, being about eleven feet wide and eighty feet long, and that on the side of said platform where it formerly joined said depot building it was elevated above the natural lay of the ground about ten feet high and that said ground was thickly covered with rocks and boulders and logs; that after moving said depot building defendant owned, maintained and operated a regular station at said town of Herrick, Idaho, and sold tickets to said point from various points along its line, and used, maintained and operated said platform for the use and convenience of passengers upon its trains, and that said platform was, after the removal of said depot building used for receiving and discharging passengers and their baggage to and from its trains, and was generally used by the public for the purpose of boarding and alighting from the trains of the defendant.

III.

That upon the 15th day of November, A. D. 1916, the plaintiff, as a passenger and intending to board westbound train, operated through said station by

the defendant at about 5:30 or 6:00 p. m., waited as such passenger upon said platform for said train to make its regular stop.

IV.

That the defendant negligently and carelessly failed to build and maintain any guard rail around said platform after removing its said depot building, and that upon said 15th day of November, A. D. 1916, negligently and carelessly failed to maintain any railing or guard about the edge of said platform to prevent persons properly in the use of said platform from falling said distance of ten feet to the ground below, and that defendant negligently and carelessly failed to maintain any light on or about said station and platform, and left the same dark. That upon said day the plaintiff, while such passenger, as aforesaid, and on account of the unguarded and unlighted condition of said platform and station, fell from the said platform a distance of ten feet or more to the ground below, injuring him as hereinafter set out. That it was necessary and proper, in order to make said platform safe to passengers and others in the use thereof, to maintain the same in a safe condition, and to maintain some proper guard or railing about the said platform, and especially at the arrival of said train, which was in the dark, to keep the same well lighted so that passengers could safely and properly use the same, but that the defendant negligently and carelessly failed to maintain a light and left the same dark upon the said day.

V.

That in falling, as aforesaid, the plaintiff was injured as follows: Two of his ribs were broken loose from his breast bone on the right side by striking a log or rock with his side, and plaintiff struck with such force that said ribs were broken again near where they join the back bone; that the right shoulder of plaintiff was dislocated and the muscle and tendons thereof badly wrenched and sprained; that plaintiff's head struck a rock or log, causing a cut above the right eye; that plaintiff was rendered unconscious by reason of said injuries, so that he laid exposed in said condition upon a cold night for a period of about an hour before he was discovered and taken to a place where he could be cared for, and remained unconscious until about 3:00 or 4:00 o'clock the next morning; that such blow on his side and the exposure of plaintiff while lying in such unconscious condition as aforesaid, caused an injury to the right lung of plaintiff and the same to become highly inflamed to such a condition that he coughed up and discharged therefrom pus and matter continuously from the 16th day of November, A. D. 1916, to about the 2nd day of December, 1916, at which time he was able to leave the hospital where he was taken when injured, and that said right lung is affected and injured, and as plaintiff is informed and believes and therefore alleges the fact to be the said injury to said lung is of a permanent nature; that by reason of the injuries aforesaid, and the condition of plaintiff's lung as aforesaid, he was com-

pelled to cough almost continuously from the time of said injury up until December 2nd, 1916, and on account of injury to plaintiff's ribs the act of coughing was extremely painful, and on account of said injuries as alleged aforesaid plaintiff suffered great pain and suffering and still continues to suffer great pain on account of the condition of said lung as aforesaid; that on account of said injuries plaintiff is wholly disabled and is unable to perform any labor, and his injuries are of a permanent and lasting nature.

VI.

That on account of the injuries aforesaid, plaintiff was taken to a hospital for treatment, and incurred an expense of seventy (\$70.00) Dollars for medical services, and forty-five (\$45.00) Dollars for hospital fees.

VII.

That prior to said injury, plaintiff had been and was a robust, healthy man and was earning and capable of earning at the rate of Three (\$3.00) Dollars per day.

VIII.

That by reason of said injury and negligence, as aforesaid, plaintiff has been damaged in the sum of Fifteen Thousand (\$15,000) Dollars, and in the further sum of One Hundred and Fifteen (\$115.00) Dollars medical fees, and hospital expenses.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of Fifteen Thousand One

Hundred and Fifteen (\$15,115) Dollars and costs of suit.

NORRIS & YATES,

Attorneys for Plaintiff.

Postoffice address and residence, St. Maries, Idaho.

CORKERY & CORKERY,

Attorneys for Plaintiff.

Postoffice address and residence, Spokane, Washington.

State of Idaho,

County of Benewah,—ss.

Bertholomew Chamberlain, being first duly sworn, upon his oath says: That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof and that he believes the same to be true.

BERTHOLOMEW CHAMBERLAIN.

Subscribed and sworn to before me this 12th day of January, A. D. 1917.

William F. Sargent,

(Seal)

Notary Public.

Filed January 12, 1917.

Warren T. Shepperd, Clerk,

By C. B. Moon, Deputy.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

No. 677.

BARTHOLOMEW CHAMBERLAIN,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
ROAD COMPANY, a Corporation,

Defendant.

ANSWER.

Comes now the defendant and in answer to the complaint of plaintiff herein admits, denies and alleges as follows:

I.

Admits the allegations of paragraph One of plaintiff's complaint.

II.

In answer to paragraph Two of plaintiff's complaint, defendant denies that the defendant did on October 1st, 1916, or for a period of more than six months prior thereto, or at any time since said date, own or maintain or operate a regular or any depot or station at the town of Herrick, Idaho, together with a platform in connection with said depot, or at all, for the use and convenience of passengers upon the defendant's trains, or for any purpose, or that any depot or station or platform were used at said town of Herrick, Idaho, for receiving or discharging passengers to or from the train of defendant, or was generally, or at all, used by the public for such pur-

pose; denies that said alleged depot or platform at said point were constructed between a siding joining the main line just west of the said depot or the main line, or at all, at which points the tracks were elevated above the natural lay of the ground about ten feet, or any number of feet, or that said alleged depot building was constructed upon posts about ten, or any number of feet high, and denies that any platform in connection therewith extended from said alleged depot proper out to the main line a distance of about eleven feet, or any number of feet. Denies that on the west side of said alleged depot building any platform was extended from the main line to the side track, or otherwise, for the purpose of transferring freight or baggage from the main line to said side track, or for any purpose, or completely, or at all, bridged the low land between the side track and the main line on the west side of said depot; denies that on or about the 1st day of October, 1916, or at any time, the defendant removed said alleged depot building, or that portion of the platform west of said building, or any portion thereof, from said station to some, or any, other point along its line; denies that the defendant left the alleged platform, or any platform, extending from said alleged depot building to the main line, being about eleven feet wide or eighty feet long, or any width or length, or that on the side of said platform where the former joined said alleged depot building it was elevated above the natural lay of the ground about ten feet high, or any number of feet, or that said ground was thickly

covered, or covered at all, with rocks or boulders or logs; denies that after moving said alleged depot building defendant owned, maintained or operated a regular station, or any station, at said town of Herrick, Idaho, and denies that it sold tickets to said point from various, or any, points along its line or used, maintained or operated said platform for the use or convenience of passengers upon its trains, or at all, or that said platform was, after the alleged removal of said alleged depot building, used for receiving or discharging passengers or their baggage to or from its trains, or otherwise, or was generally used by the public for the purpose of boarding or alighting from the trains of the defendant, or at all.

III.

In answer to paragraph Three of plaintiff's complaint, defendant says that it has no information or belief upon the matters set forth therein sufficient to enable it to answer the allegations thereof, or any of the said allegations of paragraph Three, and that it bases its answer and denials on that ground and denies each and every of said allegations and each and every of the statements and allegations contained in the said paragraph numbered Three, and defendant denies that plaintiff went upon said alleged platform, or any platform, or to said alleged station, or any station, for the purpose of becoming a passenger on defendant's train or entering said train as a passenger, and denies that plaintiff waited at said alleged station for the purpose or with the intention of becoming a passenger on defendant's

train at any time on or about said 15th day of November, 1916.

IV.

In answer to paragraph Four of plaintiff's complaint, defendant denies that the defendant negligently or carelessly failed to build or maintain any guard rail around said alleged platform after removing its said depot building, or at any time, or that upon the said 15th day of November, A. D. 1916, or at any time, defendant negligently or carelessly failed to maintain any railing or guard about the edge of said platform to prevent persons properly, or otherwise, in the use of said platform from falling said distance of ten feet to the ground below, or any distance, and denies that the defendant negligently or carelessly failed to maintain any light on or about said alleged station or platform or left the same dark. Denies that upon said day, or any day, the plaintiff, while such alleged passenger, or at all, or on account of any unguarded or unlighted condition of said alleged platform or station, fell from said platform a distance of ten feet or any number of feet to the ground below, injuring him as set out in the complaint, or at all. Denies that it was necessary or proper in order to make said alleged platform safe to passengers or others in the use thereof to maintain the same in a safe condition or to maintain some, or any, guard or railing about the said alleged platform or especially on the arrival of said train to keep the same well lighted so that passengers could safely or properly use the same. Denies that the defendant

negligently or carelessly, or at all, failed to maintain a light or left said place dark upon said day.

V.

In answer to paragraph Five of plaintiff's complaint, the defendant has no information or belief upon the subject and therefore, and from want of information and belief, denies that two of plaintiff's ribs were broken loose from his breast bone on the right side by striking a log or rock with his side or that plaintiff struck with such force that said ribs were broken again near where they joined the back bone; denies that the right shoulder of the plaintiff was dislocated or the muscles or tendons thereof badly wrenched and sprained; denies that plaintiff's head struck a rock or log causing a cut above the right eye; denies that plaintiff was rendered unconscious by reason of said injuries so that he lay exposed in said condition upon a cold night for a period of about an hour before he was discovered or taken to a place where he could be cared for or remained unconscious until about 3 or 4 o'clock the next morning. Denies that such blow upon his side or the exposure of the plaintiff, while lying in such, or any, unconscious condition, caused an injury to the right lung of the plaintiff or caused the same to become highly inflamed to such a condition that he coughed up or discharged therefrom pus or matter continuously from the 16th day of November, A. D. 1916, to about the 2nd day of December, 1916, or at any time, or that said right lung is affected or injured and denies that plaintiff is informed the said

alleged injury to his lung is of a permanent nature. Denies that by reason of the alleged injuries, or the alleged condition of the plaintiff's lung, he was compelled to cough almost continuously, or at all, from the time of said injury up until December 2, 1916, or to any other date, or on account of the injury to plaintiff's ribs, the act of coughing was extremely painful, or on account of said alleged injuries, plaintiff suffered great, or any, pain or suffered or still continues to suffer great, or any, pain on account of the condition of said lung; denies that on account of said injuries plaintiff is wholly, or at all, disabled or unable to perform any labor or his injuries are of a permanent or lasting nature.

VI.

In answer to paragraph Six of plaintiff's complaint, defendant says that it has no information or belief upon the matters set forth therein sufficient to enable it to answer the allegations thereof, or any of the said allegations of paragraph Six, and that it bases its answer and denials on that ground and denies each and every of said allegations and each and every of the statements and allegations contained in the said paragraph numbered Six.

VII.

In answer to paragraph Seven of plaintiff's complaint, defendant says that it has no information or belief upon the matters set forth therein sufficient to enable it to answer the allegations thereof, or any of the said allegations of paragraph Seven, and that it

bases its answers and denials on that ground and denies each and every of said allegations and each and every of the statements and allegations contained in the said paragraph numbered Seven, and defendant denies that prior to the said alleged injury the plaintiff was a robust, or healthy man and denies that he was earning \$3.00 per day, or any sum whatever, and denies that he was capable of earning any sum whatever in excess of \$2.50 per day.

VIII.

In answer to paragraph Eight of plaintiff's complaint, defendant denies that by reason of said, or any, injuries or the negligence or any negligence of defendant, plaintiff has been damaged in the sum of Fifteen Thousand Dollars, or any sum whatever, or in the further sum of One Hundred Fifteen Dollars medical fees or hospital expenses, or any other sum whatever.

AND FOR A FURTHER AND SEPARATE ANSWER AND DEFENSE TO PLAINTIFF'S COMPLAINT HEREIN, DEFENDANT ALLEGES AS FOLLOWS:

That, if the plaintiff met with any accident or received any injury while on, in or about defendant's railroad tracks or grounds or platform or station on said 15th day of November, 1916, or at all, the same was not received, sustained or brought about by or through or on account of any negligence or carelessness on the part of the defendant or by, through or on account of any failure of the defendant to discharge

its duties but that such injury, if any was sustained, was received and sustained by the plaintiff, wholly and alone through the negligence, fault and carelessness of the plaintiff, in that said plaintiff failed to observe his surroundings and make use of his eyesight and other senses; that if the physical condition of the premises was as complained of, it was apparent to anyone, and said plaintiff must have been fully aware thereof, or, by the exercise of ordinary care, could have known thereof, at the time when he claims he met with his said injury.

WHEREFORE, said defendant prays that said action be dismissed and that it have judgment against said plaintiff for all costs and disbursements incurred herein.

GEO. W. KORTE,

608 White Bldg., Seattle, Wash.

J. F. AILSHIE,

Coeur d'Alene, Idaho,

Attorneys for Defendant.

State of Washington,

County of King,—ss.

H. B. Earling, being first duly sworn, on oath deposes and says: That he is the vice-president of the defendant corporation, CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, and as such is authorized to make this verification and makes the same for and on behalf of the defendant; that he has read the foregoing answer, knows the contents thereof, and that the same is true as he verily believes.

H. B. EARLING.

Subscribed and sworn to before me, this 26th day of March, A. D. 1917.

(Notary Seal)

M. C. MUMFORD,

Notary Public in and for the State of Washington,
residing at Seattle therein.

Filed March 28, 1917.

W. D. McReynolds, Clerk.

By L. M. Larson, Deputy.

No. 677.

(Title of Court and Cause of Action.)

VERDICT.

We, the jury in the above entitled cause find for the plaintiff and assess the damages to be recovered herein at the sum of \$7,500.00.

MIKE SHINE, Foreman.

Filed June 8, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 677.

JUDGMENT.

This cause came on regularly for trial, Corkery & Corkery and R. B. Norris appearing as counsel for the plaintiff and George W. Korte and J. F. Ailshie appearing as counsel for the defendant. Thereupon, a jury of twelve persons were duly selected, empanelled and sworn to try said cause; and witnesses on the part of the plaintiff and defendant were duly

sworn and examined. After hearing the evidence, the arguments of counsel and the instructions of the court, the cause was submitted to the jury, who retired to deliberate upon their verdict and subsequently returned into court and being called all answered to their names, and then rendered the following verdict, which was accepted by the court and entered on the minutes as follows:

“We, the jury in the above entitled cause, find for the plaintiff and assess his damages against the defendant at (\$7,500.00) Seven Thousand Five Hundred Dollars.

“MIKE SHINE, Foreman.”

WHEREFORE, by virtue of the law and by reason of the premises aforesaid,

IT IS ORDERED, ADJUDGED AND DECREED that the plaintiff Bartholomew Chamberlain have and recover from the defendant, Chicago Milwaukee & St. Paul Railroad Company, a corporation, defendant, the sum of Seven Thousand Five Hundred (\$7,500.00) Dollars, together with interest thereon at the rate of 7 per cent per annum from the date hereof until paid together with plaintiff's costs and disbursements incurred in this action taxed at One Hundred Fourteen and 15-100 (\$114.15) Dollars.

W. D. McREYNOLDS, Clerk.

June 8, 1917.

Filed June 8, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 677.

PETITION FOR NEW TRIAL.

To the Hon. F. S. Dietrich, Judge of the United States District Court above named:

Comes now the defendant, Chicago, Milwaukee & St. Paul Railway Company, a corporation, and petitions the court to set aside the verdict returned by the jury in the above entitled cause and to grant to the defendant a new trial upon the following grounds:

1. Excessive damages appearing to have been given under the influence of passion or prejudice;
2. Insufficiency of the evidence to justify the verdict;
3. The verdict is against the law;
4. Misconduct of the jury;
5. Accident or surprise which ordinary prudence could not have guarded against;
6. Errors in law occurring at the trial, to-wit:

(a) The court erred in permitting the witness, Frank LaBranch to testify over the objection of the defendant that just prior to the time the plaintiff fell from the platform he shook hands with the plaintiff and bid him goodbye and that the plaintiff stated, "I am going along with you on this train," or words to that effect;

(b) The court erred in permitting proof to be made over the objection of the defendant, that at the time the plaintiff went upon the motor car and road thereon, he paid to the operator of the car a sum of

money, to-wit, fifty cents, and saw the other men riding on the car hand him money several times.

7. Specifications wherein the evidence is insufficient to justify the verdict:

(a) There is no evidence to justify the verdict; it is the result of passion and prejudice;

(b) The evidence greatly preponderates to the effect that the plaintiff, at the time he went upon the platform and made use of it, was not an intended passenger and not entitled to the rights of a passenger;

(c) The evidence largely preponderates in favor of the defendant and is without dispute that the plaintiff's injury was the result of a risk of which he was fully aware, and resulted in whole or part from his reckless misconduct;

(d) The proximate cause of plaintiff falling from the platform was not the absence of the railing but his stumbling against or walking around or against a box or trunk on the platform and his attempt to walk after he claims he was blinded by the light from the locomotive;

(e) That the evidence clearly discloses that the plaintiff was guilty of contributory negligence in that he was in a state of voluntary intoxication at the time of the accident and that the accident resulted primarily from such intoxication;

(f) That there is no evidence showing that the plaintiff has sustained any damage to his earning powers or his capacity to labor and earn wages or a compensation the same now as he could before the

said accident and that the evidence wholly fails to show that he has lost any time whatever on account of the said alleged injury except the time that he was in the hospital.

(g) That the evidence wholly fails to show any actual or substantial damages, any loss of earning power or any continuing pain or suffering or any special damages except the sum of \$155.00 paid out for medical aid and hospital charges and that the verdict clearly discloses prejudice and passion and the lack of unbiased judgment and impartial judgment on the part of the jurors.

8. The court erred in denying defendant's motion, made at the close of all the evidence, to direct the jury to return a verdict for the defendant upon each and every ground urged at the time.

This petition will be presented upon the pleadings, papers and files in the action and upon the minutes of the court, including not only the clerk's minutes but also the reporter's notes of the evidence which will be extended by the reporter who took the evidence upon the trial of said cause, together with all the exhibits introduced upon the trial of said cause, and a bill of exceptions to be hereafter prepared, served, filed and settled.

GEO. W. KORTE.

Postoffice address: Seattle, Washington.

J. F. AILSHIE,

Postoffice address: Coeur d'Alene, Idaho.

Attorneys for Defendant.

*In the District Court of the United States for the
District of Idaho, Northern Division.*

BARTHOLOMEW CHAMBERLAIN,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
ROAD COMPANY, a Corporation,

Defendant.

AFFIDAVIT OF SERVICE.

State of Idaho,

Count of Kootenai,—ss.

W. H. Bonneville, being first duly sworn, on oath
deposes and says:

That I am now and, at the several times herein-
after mentioned, was a citizen of the United States
and of the State of Idaho, over the age of twenty-one
(21) years and not a party to nor interested in the
event of the above entitled action; that I received the
annexed Petition for New Trial from J. F. Ailshie,
one of the attorneys for defendant, and duly and reg-
ularly served the same upon Corkery & Corkery, at-
torneys for plaintiff, by placing a true copy thereof
in a properly addressed envelope, postage prepaid,
directed to Corkery & Corkery, Rookery building,
Spokane, Washington, and depositing the same in the
United States Postoffice at Coeur d'Alene, Idaho, on
the said 11th day of June, 1917, between the hours
of 12 o'clock M. and 1 o'clock P. M., and that there is
a regular mail service between Coeur d'Alene, Idaho,
and Spokane, Washington.

That at the same time and in the same manner I mailed a true copy of said Petition for New Trial to Messrs. Norris & Yates, attorneys for plaintiff, directed to said Messrs. Norris & Yates at St. Maries, Idaho, and that there is a regular mail service between Coeur d'Alene, Idaho and St. Maries, Idaho.

WM. H. BONNEVILLE.

Subscribed and sworn to before me this 11th day of June, 1917.

(Seal)

C. McARTHUR,
Notary Public.

Residing at Coeur d'Alene, Idaho.

Filed June 11, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 677.

ORDER.

This cause came on regularly on this 27th day of August, 1917, for hearing upon the petition of defendant for a new trial, the plaintiff being represented by his attorney, Robert Corkery, and defendant being represented by its attorneys, George W. Korte and J. F. Ailshie. After argument by the respective counsel and the court being fully advised in the premises, it is now ordered that the defendant's petition for a new trial be, and the same is, hereby granted unless the plaintiff elects within ten (10) days from this date to accept a reduction of said judgment in the sum of two thousand five hundred

(\$2,500.00) dollars, together with the interest accrued on that sum from the date of verdict, and to accept judgment in the sum of five thousand (\$5,000.00) dollars, and to waive said excess, then and thereupon said petition for a new trial shall be denied. Upon the Court's announcing its ruling, plaintiff's attorney announced in open court that plaintiff would accept the modification of the judgment and waive the said sum of two thousand five hundred (\$2,500.00) dollars, together with the interest thereon accrued, and accept judgment in the said sum of five thousand (\$5,000.00) dollars, together with the interest on said sum from the date of verdict rather than have a new trial granted.

NOW, THEREFORE, it is hereby ordered, adjudged and decreed that the said judgment heretofore rendered and entered herein be, and the same is, reduced to the sum of five thousand (\$5,000.00) dollars, together with interest accrued on said sum from the date of verdict, and the said petition for a new trial is hereby denied and overruled, to which said order and judgment defendant duly excepts.

Done in open court this 27th day of August, 1917.

FRANK S. DIETRICH,

District Judge.

Filed August 27, 1917.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 677.

STIPULATION.

It is STIPULATED by and between the attorneys for the respective parties that the defendant shall have, and it is hereby granted, until August 15, 1917, in which to prepare, serve and file its Bill of Exceptions, and Statement of Facts on motion for new trial or appeal and that motion for new trial herein may be heard and determined by the Court at any time during the month of August at the Court's convenience and at any place the Court may direct.

Dated at Coeur d'Alene, Idaho, this 14th day of July, 1917.

R. B. NORRIS,
CORKERY & CORKERY,
Attorneys for Plaintiff.

GEO. W. KORTE,
J. F. AILSHIE,
Attorneys for Defendant.

The foregoing stipulation is hereby approved and defendant is hereby granted until August 15, in which to prepare and serve its bill of exceptions and statement to be used on petition for new trial or an appeal or writ of error in said cause.

Dated July 18, 1917.

FRANK S. DIETRICH,
District Judge.

Filed July 19, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 677.

STIPULATION.

IT IS STIPULATED by and between the attorneys for the respective parties that the defendant shall have, and it is hereby granted until September 1 in which to prepare, serve and file its Bill of Exceptions, and Statement of Facts on motion for new trial or appeal.

Dated at Coeur d'Alene, Idaho, this 10th day of July, 1917.

CORKERY & CORKERY,

R. B. NORRIS,

Attorneys for Plaintiff.

GEO. W. KORTE,

J. F. AILSHIE,

Attorneys for Defendant.

(Title of Court and Cause.)

No. 677.

BILL OF EXCEPTIONS.

The defendant in the above entitled cause hereby, in accordance with the rules of this Court and the law, serves and files the following as a draft of its proposed Bill of Exceptions.

GEO. W. KORTE,

J. F. AILSHIE,

Attorneys for Defendant.

The undersigned attorneys of record for plaintiff, Bartholomew Chamberlain, do hereby acknowledge the receipt of a true and correct copy of the attached

draft of the defendant's proposed Bill of Exceptions this fourteenth day of August, 1917.

CORKERY & CORKERY,

R. B. NORRIS,

Attorneys for Plaintiff.

BE IT REMEMBERED, that heretofore on the seventh day of June, A. D. 1917, the above entitled cause came on for hearing and trial in the above named Court, sitting at Coeur d'Alene in the State of Idaho, before the Honorable Frank S. Dietrich, judge presiding, and a jury.

The plaintiff appearing and being represented by his attorneys and counsel, Messrs. Corkery & Corkery, and Messrs. Norris & Yates, and the defendant appearing and being represented by its attorneys, George W. Korte, Esquire, and J. F. Ailshie, Esquire,

Whereupon the following proceedings were had and done, and testimony taken, to-wit:

The jury was duly impanelled and sworn to try the cause.

BARTHOLOMEW CHAMBERLAIN, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION By

MR. CORKERY:

Q. Your name is Bart Chamberlain, and you are the plaintiff in this case?

A. Yes, sir.

Q. You reside where, Mr. Chamberlain?

A. Right across from Herrick, Idaho.

Q. That is on the line of the Milwaukee railroad, the main line?

A. Yes.

Q. Is that on the main line?

A. On the main line.

Q. Of the Chicago, Milwaukee & St. Paul Railway?

A. Yes.

Q. What sort of a station did the company maintain there at that point?

MR. KORTE: At what time are you talking about?

MR. CORKERY: Well, in 1916, in the fall there, what sort of a station and buildings was about that place?

A. You mean at the time of this accident?

Q. Before you were hurt.

A. They had a pretty fair place, used for this lumbering, selling tickets, and receiving parcels and freight.

Q. Before I get into this, I will ask you what your business is.

A. Farming.

Q. How long have you resided at Herrick, Idaho, or in that vicinity?

A. I took up a homestead there, it must be about sixteen or seventeen years ago.

Q. How much of a farm do you have there now?

A. Well, it is supposed to be 106 acres. I had 120 acres, but I have disposed—

Q. How long have you been in this vicinity about here, in this country?

A. Since 1889.

Q. Now you say that they had a station there with a depot?

A. Yes, sir.

Q. And what sort of a platform did they have prior to the day you got hurt?

A. They had about the same platform in front of the depot.

Q. About how long was it, and about how wide was it?

A. Well, in front I don't hardly think it is much more than ten or ten and a half in width.

Q. And about how long?

A. And it might be, it is about ninety or ninety-three feet in length, the platform was.

Q. The platform is of plank, I suppose?

A. Plank.

Q. Where is that, with reference to the main track?

A. The main track is on the south side of where the depot had been, it was then, when we was talking about, and there is a branch road leaving the main line up to Big Creek.

Q. A branch leaves there?

A. A branch, a logging road.

Q. Where is the depot with reference to the branch and the main line?

A. Right in that V.

Q. Right between the two?

A. Between the two.

Q. And about what was the distance between the branch track and the main track where the depot was?

A. The distance, you mean?

Q. Yes, in feet.

A. Well, to where I fell, I don't think—

Q. No; I want to know the distance from the main track over to this branch track, about how many feet, just roughly?

A. Well, it was almost coming together in a V shape; it was plank, so that they could transfer from one track—

Q. But at the place where the depot was, can you tell us about how far from the main track over to the side track, at the place where the depot was built?

A. Well, it couldn't be much more than maybe forty feet.

Q. Now, was the platform which you describe, was that along side of the main track or the other track?

A. Well, it was supposed to be on both tracks, I suppose; that is the way I have always—

Q. How close was the platform which you have described to the jury to the main track? Was it right along side?

A. It was right facing on the main line. There is a platform for about ninety or ninety-three feet in width right on the main line.

Q. Right along side of the track, I suppose?

A. Yes, right along side of the main line.

Q. Now when, if at all, was that depot building moved away?

A. Well, it was moved away some time in October, from the first, or between the first and the tenth; I don't know just exactly.

Q. The first of October what year?

A. 1906.

THE COURT: You mean 1916?

A. 1916.

MR. CORKERY: Q. That would be last year?

A. Yes.

Q. And before that depot was moved was that station used there by the company for the purpose of discharging and taking on passengers?

A. Yes, sir.

Q. Then it was moved, you say, October 1. Now just describe to the jury the condition of the platform and depot premises after the depot was taken away, the depot building.

A. After they moved the depot, loaded it on the cars, they left that place there, and they moved it to Marble Creek, which they are using on account of the logging up there, I suppose, for the same purpose.

Q. Just tell the jury what the condition of the place was there after they moved it away.

A. And then when they moved it away they left just the front platform of where the depot was, never put neither a guard nor never put lights for a train to be late, never put nothing of that kind there; just left it just the way they left it; left a hole right there.

Q. Where was the hole, with reference to the platform? Was it alongside of the platform?

A. It was within, oh, it might be from one end of the other, it might have been such a thing that they left there maybe forty feet from one end or the other, left a hole right on the side of this walk that they left there in front.

Q. On the side of what?

A. On the side along there of this walk.

Q. You mean the walk or the platform?

A. The walk or the platform, as they call it now.

Q. About how deep was that hole?

A. Well, it must be,—we measured I think about twelve feet.

Q. Twelve feet deep?

A. Twelve feet deep right there, where a person fell; they can't fall any less than twelve or fourteen feet; and there is some log drift during high water, and other trash, drifted and lodged right there.

Q. What was the shape or condition of the bottom of this hole after the depot had been moved? What did the hole look like, the bottom of it?

A. The bottom, it was nothing but dirt and rock, that when they fill up this, roll a lot of rock and logs and so on, left there.

Q. Was there anything else in the bottom at the time that you got hurt?

A. There was a stump right close to where—it was left in the hole there, was a big stump left there.

Q. Now you say that the hole was left after the

depot was moved, for a distance of about how many feet along the platform, how long?

A. Oh well, it might have been about between forty and some odd feet, forty and some odd feet.

Q. After the depot was moved what did the company do with reference to maintaining that as a station?

A. They take on passengers, selling tickets, just the same as they did before.

Q. What trains made stops there after they took the depot and about the time you got hurt, on November 15, last year?

A. Well, I didn't understand that.

Q. I say what trains made stops there?

A. It is the one that goes up in the morning at 10:22, which we called that 18.

Q. That is a passenger train?

A. That is a passenger. And in the evening the same; we call that 17, going toward Spokane, at 5:02, supposed to be; it used to be.

Q. I will ask you whether or not the company continued to sell tickets from other points on their line to that point?

A. They sold tickets, and I think, I actually believe they are selling right to this day, because it ain't more than a week or so that I got a ticket right from St. Maries to Herrick myself; it ain't more than a week or so.

Q. What is the fact as to whether or not passengers are picked up there from day to day, and were

picked up at about the time you were hurt, by the company?

A. Well, they were taking passengers with the flags.

Q. And did they do that from day to day?

A. Well, I don't know whether they would do it today, but if you are on the platform they will stop or slow down, and another thing I will say, I was on the platform when another man came, and there was nobody got on and nobody got off; there was a man that wanted to take the train that evening, and asked me whether, if they have to flag this train. And I said, "He is the conductor there; ask him, there at the door." The conductor replied to him, and he says, "No; we stop here, and we have no order to discontinue this place or go by, we stop whether passengers or no passengers." I hear the conductor say that myself.

Q. Now on the day that you got hurt, what day was that again now?

A. It was on the fifteenth of November, the evening of the fifteenth of November.

Q. Last year?

A. Last year.

Q. And what train did you attempt to take on that day, if any?

A. Seventeen.

MR. KORTE: That is leading and suggestive, Your Honor.

MR. CORKERY: Q. What time is that train due there?

A. Well, when they are on time it is supposed to be at 5:02.

Q. Five-two p. m. or a. m.?

A. Five-two p. m., in the evening.

Q. And when did you go to the station grounds to take that train, or about what time?

A. I left home, I must have left home just about half an hour or maybe three-quarters of an hour, to go from my home to get the train. I have to push the river with poles, swift water; I had to push pretty near a quarter of a mile to get to that train.

Q. You came across the river in a boat, you say?

A. Yes.

Q. What sort of a boat?

A. It is what we call a swift water boat.

Q. A canoe?

A. It is different from canoes; it is a canoe; it is different from a skiff; it is made for swift water.

Q. And you say your home is about what distance from the—

A. Oh, it must be close on to half a mile, the way we have got to go, but it is a little over a quarter, straight, I suppose.

Q. What river is that you cross, to get—

A. That is on the St. Joe river.

Q. Now you got to the depot grounds about what time?

A. I got there along about,—oh, it must have been about maybe fifteen or twenty minutes before the train.

Q. What time would that be?

A. That would be maybe four something, after four, something.

Q. After four?

A. Yes. And then I was told by some one there

MR. KORTE: I object.

MR. CORKERY: Yes, not what you were told.

Q. Was it dark when you got there, or light?

A. It was getting dark.

Q. Just getting dark?

A. Just getting dark at that time.

Q. What did you do after you got there?

A. They told me that the train might be half an hour or an hour late. Well, then I started to walk down the track to meet a man that wanted me, where I was going to Plummer, I had some business there, and he had told me that he wanted me to do some business for him too, if I go there.

Q. You walked down the track?

A. I walked down the track and met him.

Q. In which direction?

A. Right straight down, say northwest or west from this depot, where the depot stands.

Q. Was this an east bound or a west bound train that you were going to take?

A. West bound.

Q. West bound train?

A. Yes.

Q. And you walked down the track for about what distance?

A. I walked down the track, it must be pretty near a quarter of a mile, until I met this man.

Q. Then did you return to the depot?

A. We come as far as this bridge. There is a bridge across Big Creek, and we sat there, and to where, if I could hear the train, we feel I could walk fast enough to make that train. We sat there until it must be close on to 7 or half past 6 or 7, until I hear the train coming, and he told me to, this man Robinson, he said, "Bart, I think you had better go; I hear the train," and I said, "Yes, I hear it, too."

Q. You went on down to the depot?

A. I walked right on down to the depot. Just then the train had come through this tunnel; this tunnel come through there about a mile or better, or somewheres near a mill. Well, then I got to the depot, and I met some of the fellows there, and says, "I am going." "Well, Bart," they said, "I bid you goodbye." And I says, "I am going on the same train," and just then the train was coming around, and there was a box or a trunk right on that platform, and as I was coming I just stepped right around to go behind this, so as to catch the train. When they stop there is always a space behind that you have got to got at the other end of the depot, on the east end of the depot. So then as I went to go around that trunk, some way, I don't know, I just made a step, the same as usual, and off I went, off, and of course I know when my foot missed, I know that I was a goner, but I didn't know where I was going to land.

Q. Did you fall into this hole you have described?

A. Yes, sir, I fall right in that hole.

Q. Just a minute, Mr. Chamberlain. Was there any light,—first I will ask you this,—what was the distance away, in the direction from which the train was coming, that you could first see the light of the train from the depot, about how many feet away?

A. Oh, it might be about three or four hundred yards to where the platform is now, coming kind of around where it strikes this depot,—the flash—

Q. Just a minute. That is to say, there is a curve—

A. There is a curve.

Q. And the distance is what from the curve to the platform?

A. Just about three hundred yards, I suppose; maybe two or three hundred yards, or six hundred feet or nine hundred feet; I don't know just what it could be.

Q. Was there any light came from the train about the time you fell, and, if so, describe that.

A. Yes. The train was just about making this curve when I stopped to go around this trunk, and a kind of a flash struck me in the face, but I don't know—I will say—

MR. KORTE: Of course, Your Honor, I want to object to the light; there is no charge of negligence on the ground that the light blinded him, or that these trunks were there. The only charge of negligence is that there was no railing maintained at this particular platform.

THE COURT: This will be one of the circumstances, is all. Go ahead, you say the light struck you.

A. Yes, the light struck me and kind of blinded me a little bit, and I went to go around. There was neither a guard to protect me or nobody else, and—

Q. Just a minute. Was there any light about the depot, any light that you saw there?

A. No, there is no light of any kind there, outside of the locomotive light.

Q. Is there any light about the depot building or grounds which would in any way light up the platform or this hole or the edge of the platform in any way?

A. No light of any kind, unless a person would come, the trains would be late, and away after night they might bring a lantern to flag the train, is all.

Q. Was there any guard or barrier or any protection of any sort about the edge of this platform next to the hole?

A. No protection, no guard of any kind at that time.

Q. What was the condition of the night, as to being dark or otherwise?

A. Well, being as the train was late, I should judge from the best I know, that train was late, and it was getting dark, it was pretty dark, but how dark of course, I wouldn't say. It was a dark night.

Q. At the time the train pulled in what was the condition of the night then?

A. A dark night.

Q. Is there anything about that country there that make it dark?

A. On account of being so deep among the mountains, of course, it will be naturally darker than it would be on a level, in open country.

Q. How near are the mountains or hills there to the track?

A. Oh, it ain't far. Right at Herrick there you can strike a pretty good sized mountain within a few hundred yards.

Q. Now, what do you know after you fell into the hole?

A. I know nothing. When I see I was going, and when I struck, I tried to move, but I struck on a log, I suppose, I suppose it is the end of a log, or might be a big rock, struck me somewheres in the side here and my shoulder. That is all I know from then until about 4 o'clock next morning, suffering.

Q. What did you know at 4 o'clock? What did you find out then, and where were you?

A. They had picked me up and took me to a place there that used to be a store and postoffice, but everything had moved. It belonged to a friend of mine there. And they laid me in the bed, and when I come to—the person that is that long unconscious, well, he surely must be suffering.

Q. What was your condition? How did you feel when you woke there in bed at that hour?

A. Well, I tried to move, when I first come to, I tried to move, tried to locate myself. I know when this thing happened, and I didn't know how long it

had happened, but I couldn't locate nobody, and I asked,—I hollered, the best I know, the best I could, to see who were there. Nobody answered, and finally I managed to get on my feet, suffering and so on, I got on my feet, and with this hand I got in my pocket and lit a match, and just as soon as I see the light I know where I was, and there was a young kid there—

Q. Well, Mr. Chamberlain, you were there in bed, and how long did you stay there in that store, about what length of time?

A. After I fell—

Q. No, after you woke up in bed.

A. Well, I got one of the men—

THE COURT: How long were you there? How long did you stay in the store?

A. Well, from 4 until about 10, 11; it must have been about 6 or 7 hours.

MR. CORKERY: Q. Six or seven hours you stayed in the store?

A. Six or seven hours.

Q. Were you in bed all of that time?

A. I laid in bed. When I could get up I would get up and try to walk.

Q. Where were you taken from the store?

A. I was taken to the train; they packed me to the train. It happened to be that there was an engine and a caboose coming down.

Q. What time of day were you taken on this engine and caboose?

A. Along close on to 11 o'clock.

Q. Eleven o'clock in the forenoon of the next day?

A. In the forenoon of the next day, on the sixteenth.

Q. How did they pack you out?

A. On stretchers.

Q. Stretchers?

A. Yes, sir.

Q. Where were you taken to?

A. I was taken to the St. Maries hospital, Dr. Platt's hospital.

Q. And you were carried in the caboose there?

A. Yes, sir.

Q. How were you carried there?

THE COURT: That is unimportant.

MR. CORKERY: Q. And you were taken into the hospital by what sort of a conveyance?

A. Well, I got a man to help me down to the hospital. He telephoned to Dr. Platt to meet me at the train.

Q. And did they meet you there?

A. Yes, sir; Doc. Platt met me there with his automobile.

Q. And you were taken into this hospital?

A. Yes, sir.

Q. How long did you remain at the hospital?

A. Oh, I must have been there about three or four weeks, about three or four weeks, and then a nephew of mine came, and nothing but I had to go with him.

Q. And you went to live at his place?

A. Yes, sir.

Q. And where was his house at?

A. He lived just down the river from St. Maries about a mile and a half or such a matter.

Q. Were you under the doctor's care at your nephew's house?

A. Yes, sir.

Q. And how long did you continue to be under the doctor's care?

A. Well, really I am under his care yet, as far as that goes.

Q. You still consult the doctor.

A. Yes, sir.

Q. During the time you were in the hospital, Mr. Chamberlain, what was your trouble? How did you feel?

A. When I first—when I was gone—after I come to it was nothing but pain, and it seemed that my side here was just about to drop to pieces, and the shoulder and the arm which it was that I couldn't move, almost paralyzed, and I felt when I could move it was just like taking knives and running it through my lungs and all through this side; that is the way I felt.

Q. Did you spit up at all?

A. Yes, and I begun to cough and spit, this inflamed blood and so on, and I spit,—the doctor say to me that it was hard for me; he says he can't see where in the world that phlegm and blood and so on comes from. I was spitting there for a week or such a matter a cuspidor like that full twice or three times a day.

Q. Was that blood or what was that you spit up?

A. Blood and phlegm and so on, so that it must show there was something in me to suffer.

Q. What is your condition now, Mr. Chamberlain? What is your condition at this time?

A. Well, I feel pretty—excepting this shoulder, right in the shoulder I can't very well handle it; I can handle it down, but I can't very well use that; and there is a pain, sharp pain, through my lungs when I take a long breath; it is just the same as running needles or knives through me; and right back in my shoulder, in the shoulder blade, there is a pain there that if I walk any distance there is a kind of a burning pain, just as though something has been broke or disconnected, to this day.

Q. Do you have any trouble with your shoulder in damp or cold weather?

A. Yes, I notice it a little more at the time, just about raining or such a matter.

Q. What is your condition then?

A. Oh, it is just like running needles, and pain and so on, through this side.

Q. What is the condition of your lungs when you exercise to any extent or move about rapidly?

A. My wind is short; it has never come back.

Q. Is there any soreness or pain in your chest at those times?

A. Yes; when I take a long breath I feel a pain right in my lungs.

Q. What was your condition of health, Mr. Chamberlain, prior to your injury?

A. I was just about as healthy a man as there was in the State of Idaho, I do actually believe.

Q. Were you able to work in and about your farming and other occupations?

A. Yes, sir, I was able to do as much work as any common man.

Q. Did your work before you were hurt consist of work in the open air or otherwise?

A. In the open air, farming; it is nearly all open air work.

Q. I understood you to say you were about to take this train to Plummer, is that it?

A. Yes, sir.

Q. And is Plummer upon the same line, a station upon the same line, the Milwaukee line?

A. It is right on the Milwaukee line.

Q. About how many miles distant from Herrick?

A. Well, I wouldn't say just what it is. I wouldn't say how far it is even from Herrick to St. Maries, and from St. Maries I think it is the next station below.

Q. Several stations below?

A. It is the next station from St. Maries, I think; from my place, I think it is the third station, from Herrick, my place.

Q. What expenses, if any, did you incur in connection with your treatment at the hospital and with Dr. Platt?

A. What expense?

Q. Yes.

A. Oh, well, I was under the doctor's care, of

course, and a nurse, for all the time I was in the hospital.

Q. What was your bill there, do you know, your total bill?

A. Oh, it must have been maybe a couple or three hundred dollars, two hundred or three hundred dollars.

Q. You haven't settled up with the doctor yet?

A. Not all. I have paid him quite a bit, but but there is some due.

Q. I understand you to say you are still under the doctor's care?

A. So I am; that is why I don't know what is going to be the balance.

MR. CORKERY: That is all.

CROSS EXAMINATION by

MR. KORTE:

Q. How old a man are you?

A. Sixty-seven.

Q. How long have you lived across the river from this station of Herrick?

A. Oh, I lived there since the fire in 1910.

Q. Where were you living before then?

A. I lived at the upper end of my place, just about near half a mile.

Q. Your land then lies back from where you now live?

A. Yes, sir.

Q. How much land have you got in there?

A. I have got 106 acres now.

Q. Is that your allotment?

A. It is not an allotment; it is a homestead.

Q. You took up a homestead?

A. A homestead.

Q. And have you perfected your homestead rights?

A. Yes, sir.

Q. Have you a patent to it?

A. Yes, sir.

Q. From the government?

A. Yes, sir.

Q. And what farming do you do on it?

A. Raising garden and hay.

Q. How much hay do you raise?

A. Oh, I got maybe last year, cut about thirteen or fourteen tons.

Q. Where do you sell that hay?

A. Usually sell it right there at home, or feed it out.

Q. Did you sell any of it this year, or last year, last fall or this spring?

A. Sold it all.

Q. How did you get it across the river?

A. Fed it right there at home.

Q. I asked you whether you sold some.

A. Sold it all. They bought it, you know, to feed their own stock right on the place.

Q. On the place where you live?

A. Yes, sir.

Q. Who is that man?

A. It is a man that is packing for the companies on Marble Creek.

Q. What is his name?

A. Dick Gilbert.

Q. How much did you say you sold him last winter or this spring,—all of it?

A. Yes.

Q. Did you sell any to Higgins?

A. No.

Q. This spring?

A. Not of that hay.

Q. And brought it across the river?

A. I sold some of the hay to Higgins, but I took it down to Mr. Van Dorn's place.

Q. On which side of the river?

A. On the same side I am on.

Q. You didn't bring any across the river this spring at all?

A. I brought the hay for Mr. Higgins, but, as I said, to Mr. Van Dorn.

Q. I asked you whether you brought the hay across the river.

MR. CORKERY: I object, unless he shows for what purpose,—it is going off on a tangent.

THE COURT: I assume that counsel has some purpose.

MR. KORTE: Q. Did you bring any hay across the river yourself this spring for Higgins or any other man?

A. Yes, I brought it for Higgins.

Q. Did you bring it across the river?

A. Yes, but—

Q. How did you get it across?

A. In a boat.

Q. In this boat that you say you poled across?

A. Yes.

Q. How many bales would you have in that boat at a time?

A. I didn't have no bale; I would just bundle it up and take whatever the boat would hold.

Q. And then you would pole it across the river?

A. It is mostly paddling from down below, where I got the hay from.

Q. Did you have to paddle your boat up the river then to come across to where you were going?

A. Yes.

Q. How many trips did you make there to get that hay across?

A. I might have made about two or three trips.

Q. That is swift water there, isn't it, in the St. Joe?

A. Kind of slack water there. It is a long ways between the riffles there; it ain't all swift, you know.

Q. You said you had to pole your boat across instead of paddling, in your direct examination, isn't that so?

A. From my home to the depot, I had to come through swift water, but to where I took the hay, I could almost paddle back and forth.

Q. But when you come from your home over to this little station, when you want to take the train, you have to pole your boat through the swift water?

A. I have to pole the swift water, rapids.

Q. How many times a week would you make that trip?

A. Where?

Q. From your house to the station.

A. Oh, well, if I have nothing to do I might go maybe once a day and in the summer when I am doing nothing I might go for the mail, and go and get a paper off of the train, or such a matter, maybe once, maybe twice a day,— I don't know.

Q. How often have you gotten a paper off of the train down to date, since you were hurt?

A. Since I am hurt?

Q. Yes, how many times did you ever get a paper off the train?

A. Well, there was for a long time there I used to get a paper, when I was at home, I used to get a paper nearly every day at the time I was home.

Q. So you would cross that river twice a day then by poling?

A. It was in the winter, and you could walk; it was cold.

Q. I am talking about when you had to use the boat.

A. I never used the boat much after I got hurt; there was ice.

Q. This spring did you ever get any papers off of that train, in the spring?

A. This spring, of course, after the ice went away, I would pole up a ways and get a paper.

Q. I want to know how many times you ever got

a paper off of the Milwaukee train this spring after the ice went out.

A. I might have got it maybe a dozen times or more.

Q. Now you said something about them selling tickets at this place. They never sold any tickets after the station building was taken away and moved to Marble Creek, did they?

A. They was selling tickets. You could buy your ticket—

Q. I mean at the station.

MR. CORKERY: Let him make his answer.

THE COURT: Did they ever sell any tickets at this station after the building was moved away?

A. After the building was gone, not as I know of—nobody there to sell tickets.

MR. KORTE: Q. You mean when you were at some other place and wanted to go to Herrick, they would sell you a ticket to Herrick?

A. Yes, sir.

Q. But if you wanted to get on the train at Herrick, after the building was taken away, you would have to go down there and flag the train and get on?

A. I never had to flag the train. Whenever I want to get the train or any place they would always check, and all you have got to do, they stop.

Q. If they saw you on the platform they would slow down and pick you up?

A. Yes, sir.

Q. How many times did you ever get on that train and slow it down, as you say, after you were hurt?

A. How many times?

Q. Yes, sir.

A. Oh, I don't know. I used to go down maybe, when I would be home, I would be running short of medicine, or such as that, and I would go down maybe once a week or such a matter.

Q. How many times before you were hurt did you ever slow that train down and get on?

A. Not only slow down; they would stop.

Q. How many times did that train ever stop for you before you were hurt?

A. Every time I want to go some place, but how many times I never kept track.

Q. Well, give us an idea, Mr. Chamberlain.

A. Every time I travel, but, of course, I can't say how often, how many tickets.

Q. Did you ever take that train there at that platform after the building was taken away?

A. Yes, sir.

Q. How many times did you take it? How many times did you go there to take it?

A. I must have been there maybe twenty-five or more times.

Q. Before you were hurt?

A. Before I was hurt. I had been living there for ever so long.

Q. I mean now from the time the building was taken away down to the time you fell off that platform, how many times do you claim you stopped the train there and got on?

A. After they moved the depot, I don't think

hardly I took the train there more than a few times.

Q. About how many?

A. Maybe two or three different times.

Q. Were you there when the building was moved away?

A. Yes, sir.

Q. You were there on that day, when you saw them moving it?

A. I didn't say I was there, but I could see right from my home.

Q. Did you help them load the building on the car?

A. No, sir.

Q. It was loaded onto a car, was it not, and taken to Marble Creek?

A. Yes, it was loaded on a flat car.

Q. And the train that you would take and did take before you were hurt was this No. 17, going west, and due there about 5:05 or 5:03?

A. Yes, due there at 5:02.

Q. Now, before you were hurt, and after the building was taken away, can you tell me any place you went to on that train?

A. That I went to?

Q. Yes, sir.

A. I have took the train once for Spokane.

Q. Yes. Then where? Any other time?

A. I don't know where—I might have went, took the train to St. Maries for all I know, and I don't remember—

Q. Did you go east at all?

A. I might have took the train to go up to Marble to get the mail.

Q. That is where you had to get your mail?

A. Yes.

Q. And get your groceries?

A. Yes.

Q. And get what you needed for the house?

A. Yes, sir.

Q. Now, this morning when you were hurt, what were you doing there when you got there?

A. The morning I was hurt?

Q. Yes,—where were you in the morning?

A. I was right within maybe two or three hundred yards from where I fell, from the depot.

Q. Were you at your ranch there in the morning, or that night, before you were hurt?

A. I was there the night before, yes.

Q. When you got up in the morning what did you do about your ranch, the morning of the day when you were hurt, on the fifteenth of November, the morning of the fifteenth of November, what were you doing in the morning?

A. I was home there. I left home there. I was just taking care of the garden truck, I suppose.

Q. What time was it you left home?

A. Oh, to take the train that night?

Q. No, I don't care about that. What time did you leave home that morning?

A. I left there—I don't know what time it could be,—between 8 or 9 o'clock some place.

Q. You went across the river?

A. Yes.

Q. And from there where did you go?

A. I went to Marble Creek to get my mail.

Q. And you stayed at Marble Creek until after noon?

A. I never got there until along,—I don't know what time it was,—maybe 12 or such a matter.

Q. You ate your lunch there at Marble Creek, did you?

THE COURT: Your dinner or lunch.

A. I must have done it, yes, stayed there.

MR. KORTE: Q. Who went up to Marble Creek with you?

A. Nobody that I know of.

Q. How?

A. I went alone.

Q. Did you walk?

A. Yes, sir.

Q. And when you got up there you found Frank La Branch? You found Frank La Branch and Wallace La Branch there, didn't you?

A. No. I seen Wallace La Branch.

Q. But not Frank?

A. No.

Q. Was McDowell there with you?

A. I met him there, yes, see him there that day.

Q. How long did you stay there at Marble Creek before you started back?

A. Well, I don't suppose that I was there much more than maybe an hour or such a matter.

Q. Who else was there with you and McDowell

and Wallace La Branch at Marble Creek? Was anyone else there with you?

A. There is a whole lot of people live in a place like that, you know,—lumber jacks and so on.

Q. How big a place is Marble Creek?

A. Just merely a station.

Q. One or two buildings, are there not?

A. A store and—

Q. That is all that is there?

A. That is all I know of.

Q. Except what lumber jacks come out of the woods and visit around and then go back?

A. Yes.

Q. Was there a few other lumber jacks there besides McDowell and La Branch?

A. I met a few others there. I met Hank Robinson and another man.

Q. What were the names of any of the others besides La Branch and McDowell?

A. There is lots of people I know, and I don't know their names.

Q. Give us the names of the ones you do know. There was La Branch and McDowell, and who else?

A. Hank Robinson, and I went to see a man by the name of Glover.

Q. Where does he live? Who was Glover?

A. He is working around there, but at the time he was helping to run the ferry across the river.

Q. You bought some groceries there when you were up at Marble Creek, didn't you, and had them in a sack or package?

A. No.

Q. You had some groceries?

A. No.

Q. You had nothing then?

A. Not that I know of.

Q. You didn't buy anything at the store there that day? Remember well, now. Did you buy anything at that store that day to take along with you?

A. I might have had something. I remember that I bought something and had it in a sack.

Q. You then had a sack with you when you left Marble Creek to go back?

A. Yes.

Q. What was in it?

A. Well, I don't remember what it was now.

Q. Was it groceries or a pig?

A. It was no pig.

Q. Was it groceries, something to eat, or hay, or what?

A. It might have been some groceries, or such a matter.

Q. You bought some groceries there, didn't you?

A. Something of the kind.

Q. At that store that day?

A. Yes.

Q. And you bought some kerosene, didn't you?

A. I wouldn't say for sure now.

Q. And you had a drink of whiskey when you were there?

A. Oh, well, the boys—I met the boys and they offer me a drink.

Q. How many drinks did you have, Bart, before you started west?

A. I don't think hardly that I had any more than one or such a matter.

Q. And you had a bottle with you?

A. I had no bottle. The boys that invited me to drink, they had a bottle.

Q. How many bottles did you punish before you left?

A. All I seen was a four-bit flask.

Q. How many of you patronized that flask?

A. There might have been five or six.

Q. A pretty good sized flask?

A. A flask.

Q. What do you mean by flask?

A. A four-bit flask, a full pint flask.

Q. And you drank that before you left, with the others?

A. I drank maybe a drink out of it.

Q. You said you had two or three drinks, didn't you?

A. I said I drank one out of it that I know.

Q. Aren't you sure that you took more than one?

A. Oh, well, I might have—

Q. And then you started to go west at what time?

A. Well, I wouldn't say. It must have been about half past 1 or 2, maybe.

Q. And who had this whiskey in the flask?

A. Oh, well, now, I don't know. You know—you meet so many, you know, you don't know who have

it; they call you to take a drink, and you don't know who owns that liquor, and I don't know.

Q. Every time you went up there, was that a habit, that you would be treated in that way?

MR. CORKERY: We object as not being proper cross examination.

THE COURT: Overruled.

MR. CORKERY: An exception.

Q. Is it so common that everybody had whiskey up there that you couldn't tell who had the flask this day?

A. They had liquor, you know, before the election. You know, this election there was liquor all over, but who had that liquor I don't know. I am sure I didn't have it.

Q. Anyway, who went west with you when you went down the track, you started west to walk home?

A. I only walk from the postoffice to the depot. I was going to walk home.

Q. And then didn't Wallace La Branch and McDowell go with you down the track?

A. They were a little ahead of me.

Q. You caught up with them, did you?

A. Yes.

Q. And when you caught up with them you took another drink out of their flask?

A. I never took no other drink with them.

Q. Didn't they invite you to take a drink when they took a drink?

A. Not when we left there.

Q. Wallace La Branch was drinking, wasn't he?

A. He might have been drinking before I knowed him.

Q. Well, he was staggering around and pretty well tanked up, wasn't he, Bart?

MR. COCKERY: We object to the condition of anyone except the plaintiff, if the Court please.

THE COURT: Overruled.

MR. KORTE: Q. Wallace La Branch was well tanked up when you caught up with him, wasn't he?

A. There was nobody staggering drunk.

Q. Well, they had whiskey in them, didn't they?

A. They had, but—

Q. And they asked you to drink when you caught up with them?

A. If they do ask me to drink I don't have to drink every time they ask me.

Q. But they did ask you to drink out of the flask?

A. Maybe.

Q. And you took some more drinks after you started to walk down?

A. No, I didn't take no more.

Q. How many flasks did La Branch have with him?

A. Not any, he didn't have any.

Q. When you got down about a mile and a half you flagged the speeder men, didn't you?

A. I never went that far. I walked from the postoffice, that store, to the depot, or where they had that speeder, and as I was going along they told me, "We will take you down to Herrick," and I looked at them and says, "What do you mean," and they say,

"We are going that way and we will take you down."

Q. And you got on the speeder, did you?

A. Yes.

Q. And Wallace La Branch got on too?

A. Yes, he got on.

Q. They loaded him on, didn't they?

A. No, sir; he walked like a man.

Q. Did he get on a seat on the speeder the same way you did?

A. He got on and there was a little box there, and they told him to sit there, and he sat like a man.

Q. They told him to sit there and sit like a man?

A. No; he sat like a man.

Q. Did McDowell get on too?

A. Yes.

Q. And you got down then almost to Pokono, a station between Marble Creek and Herrick, and when you got down near Pokono you picked up Old Black Joe, didn't you?

A. We see Black Joe laid right on the side there with a fit, what we call a whiskey fit that he have; when he is drinking he always got into a fit.

Q. Old Black Joe was pretty well soused, to the extent that he had a fit?

A. Yes.

Q. Who was this fellow that pulled him off the track?

A. There was another man there.

Q. He asked the men to take him along with them?

A. No. We says it was too bad to leave this man

alone, and he had about a mile to go to his ranch there, and this man that run this speeder, he says, "Boys, I will go and take you as far as right opposite this place, and I will come back and get him," so he did.

Q. Go ahead. You have got it right.

A. And then when he brought Black Joe down, then he says, "I will take some of you to Herrick," and he says, "Bart," just as well as Hank Robinson, and there was another man, this McDowell, he says, "We will carry Black Joe to his house," so we took hold of him and carried him.

Q. When did Black Joe get a gun then and go after you?

MR. CORKERY: We object to that as being entirely immaterial and not proper cross examination.

THE COURT: Overruled.

MR. CORKERY: An exception.

MR. KORTE: Q. He got his rifle, didn't he?

A. After he come—we take him in. I didn't go into the house. And then, of course, in a kind of a trance,—the man have a fit and I don't suppose he know what he was going. Well, when the speeder men come along we went a little ways, and we see Black Joe coming. He had a gun and a bucket—

Q. That was after you had taken him home?

A. After we took him home.

Q. He came back then with this gun and a bucket?

A. He went right toward—whether he come to meet me or whether he went to meet somebody else I don't know.

Q. When he came up to you what did he say to you?

A. He didn't come up to me.

Q. Who took the gun away from him?

A. A big Swede that was along with us.

Q. He took the shells out or shot them away?

A. He fired one shot, I suppose, and I went to Black Joe and said, "What do you mean," and he said, "Nothing, Bart, nothing at all, Bart."

Q. He was cussing you and you was getting back at him?

A. No such a thing.

Q. Anyway you took Black Joe on to the speeder along with you?

A. I didn't take him. He come himself. I didn't take him.

Q. Anyhow, he got on to the speeder with you, and rode down, and you all went then as far as Her-rick?

A. Yes.

Q. How many drinks did you take after you got Black Joe on?

A. I don't remember taking another drink, I tell you.

Q. Did you see the others drink?

A. I don't know.

Q. They had a bottle with them?

A. I suppose they had.

Q. Isn't it so? They had a bottle with them on the speeder, and were drinking?

A. Yes.

Q. And you took a drink with them?

A. I never took no—

Q. When you got down to Herrick the signal men unloaded you?

A. Yes.

Q. And you and Wallace La Branch went off of the platform and walked west along the track toward the bridge that you said you sat down on. When you got to the platform, Bart, it was then about half past 4 o'clock?

A. No, sir.

Q. What time of the day was it?

A. It couldn't have been more than 3 or half past three.

Q. You are sure of that?

A. Well, I know, because I had to go clean across home and came back before that 5:02.

Q. You think you went over home, do you, and came back before the train pulled in?

A. I know I did.

Q. Anyway you went down the track, and when you came back you went on to the platform and stayed there until this train came in, or until you fell off?

A. No such thing, no such thing.

Q. What bridge was it you said you sat down on?

A. When I came back from home.

Q. Is that the bridge crossing Big Creek?

A. Yes.

Q. How far west of the platform would you say that bridge is?

A. Oh, it might have been five or six hundred feet.

Q. Isn't it a quarter of a mile?

A. No, it ain't a quarter of a mile. It may be four or five hundred feet, maybe; I don't know.

Q. And you came back then onto the platform, and sat on a trunk that was there?

A. After they left us there off of the speeder I walk a little beyond that bridge, and I come back—

Q. Well, Bart—

MR. CORKERY: I object to counsel badgering the witness and cutting him off in his answers, if the Court please.

MR. KORTE: Of course, I don't want the witness to run off into the wilderness, Your Honor.

Q. When you were unloaded onto the platform there at Herrick by the speeder men you and Wallace La Branch and McDowell went west along the track?

A. Neither of them came with me.

Q. When you got off the platform, then Frank La Branch came down to the platform there, and started berating his brother because he was drunk, isn't that so?

A. He might have after I left the platform, but I never heard no word.

Q. You walked west, did you?

A. I walked west until I got beyond the bridge.

Q. When you came back from that trip you went back onto the platform?

A. I went on the platform, because I had to go beyond the platform before I could come to where my land is.

Q. When you came back on the platform you saw these boxes and the trunk, didn't you?

A. There was nothing there when I come back.

Q. How?

A. When we got off there was none there, and I walked toward the bridge; there was no such thing

Q. These boxes and the trunks were the La Branch's, that they had put there? They were going away, they were going to Salem, Oregon, their old home, weren't they?

A. Yes.

Q. You know that, don't you ?

A. Yes, sir.

Q. They were going away for good?

A. Sure. I don't know whether they were going away for good, but—

Q. You went on the platform and sat down on the trunk?

A. I never sat down on that trunk.

Q. You didn't sit down on anything?

A. No.

Q. And didn't you, while sitting there or standing there, have words with Frank La Branch over the \$10 that you owed him on the hay deal that you were in with him?

A. I went home---

Q. Answer that question yes or no. Did you have words with Frank La Branch?

A. No, I never had no word with the La Branch boys.

Q. You owed him though \$10, didn't you? Answer that yes or no.

MR. CORKERY: I object to that.

THE COURT: Overruled.

MR. KORTE: Q. You owed him \$10, didn't you, that day you were hurt?

A. I didn't owe him no \$10.

Q. And he wrote a receipt out for the \$10, and you paid him the \$10, isn't that right, that day?

A. No.

Q. Whatever you owed him that day you paid him, and he gave you a receipt for it?

A. He never gave a receipt.

Q. Did you pay him what you owed him that day before he left?

A. I had to pay \$5 to a man by the name of Glover off of that \$10, and then there was another \$5 that I was to send to him.

Q. And you borrowed the \$5 from Jim Peters, the man that lives there in the house with you, or did live with you?

A. No, I never borrowed nothing from nobody; I had money in my pocket all the time.

Q. You borrowed the \$10 in this way, \$5 from Jim Peters, and \$5 from another man?

A. No, no, no.

Q. And while Frank La Branch was having the words with you about getting this \$10 and giving you the receipt, you stood up from this box or trunk you were sitting on, and floundered around and fell off of the platform in that way, did you or did you not?

A. I did not.

Q. Of course you don't know what took place after you fell down, do you?

A. Sure I do.

Q. You were unconscious. Now when you came there on to the platform from Marble Creek, it was broad daylight, wasn't it?

A. Yes, it was in the afternoon along about 3 or-----

Q. Who was this man that you were going to do some business for at Plummer? What was his name?

A. Hank Robinson.

Q. Where does he live?

A. Well, he had a place up on the creek.

Q. Is he living there now?

A. He is dead.

Q. When did he die, Bart.

A. Last March.

Q. After you brought this suit?

A. Sure.

Q. What business were you going to do for Hank Robinson, who is now dead, at Plummer? You said you were going to Plummer to do some business for Hank Robinson. What was that business?

A. Well, I was going to get a hog for myself, pork for the winter, and he told me if I go to be sure and let him know; he was going to buy one, or such a matter. That is why I went to meet him there when I met him there on that bridge.

Q. And the two of you sat down there together?

A. Yes.

Q. He was the man you sat down with on the bridge?

A. Yes.

Q. You say the train came in there upon which you were going west to Plummer about 6:30 or 7 o'clock, is that so?

A. Might have been 6 or after 6, or such a matter, yes.

Q. Let us have it as definite as you can remember it.

A. That is as near as I can come to it. I can't say just exactly the time, but it was after 6, or maybe a little later.

Q. Well, then, you say they never had any railing about this platform since they moved the building away, is that right; they never had put a railing on there from the time they moved the building away until you were hurt?

A. No, sir, never had.

Q. They never had a railing there?

A. Never had a railing.

Q. How do you know they never had any railing there?

A. I know because I travel often enough right across from my place.

Q. You knew that very well, didn't you?

A. I knew it.

MR. KORTE: That is all.

RE-DIRECT EXAMINATION by

MR. CORKERY:

Q. Have they since put a railing there?

A. They have put a railing---

MR. KORTE: Wait a minute. It is not re-examination, and it is immaterial and irrelevant, Your Honor.

THE COURT: Sustained.

MR. CORKERY: Your Honor, there was a reason that occurred further back in the examination. Counsel asked what the conditions in and about that depot were before the accident occurred and after the accident occurred. We wish to show on the question of a railing whether there was one or was not, after the accident occurred, and if he is allowed to go into that---he brought that out himself, Your Honor, as to the conditions in and about that depot, the selling of tickets, and people stopping there, after the accident occurred. If he has done that with reference to those facts, after the accident, can we not show as to the condition of this railing after the accident?

THE COURT: What do you want to show it for?

MR. CORKERY: It was a dangerous situation and they recognized it.

THE COURT: That is wholly immaterial. The objection is sustained.

MR. CORKERY: Q. Mr. Chamberlain, why did you have to pole across the river there to make the train? Why was it necessary to pole to make the train?

A. At the time that I had to pole?

Q. Why did you have to pole? Why couldn't you paddle?

A. Well, it is swift water, swift water from my place until you get a certain distance, to where I land, and I have to use a pike pole.

Q. How long a pole is that?

A. Oh, that might be ten or twelve feet long.

Q. And you stick that down on the bottom of the river?

A. Yes, and push on that.

Q. What would happen if you paddled across there at that point?

A. You can't very well paddle in swift water.

Q. What would happen if you would attempt to paddle?

A. You would be drifting down and couldn't make no headway.

Q. How far beyond the depot would you land?

A. Just almost across.

Q. But I say if you paddled and didn't use your pole, where would you land at?

A. Oh, you might land away down below.

MR. CORKERY: That is all.

MR. KORTE: No further questions.

MR. CORKERY: Q. Mr. Chamberlain, I will ask you, at the time you attempted to take the train there, and fell from the platform, what was your condition as to being sober or otherwise?

A. I was sober, which I am a sober man.

MR. CORKERY: That is all.

THE COURT: I will excuse the jury until 2 o'clock this afternoon. Gentlemen of the jury, be careful to avoid coming in contact with outside in-

fluences, and keep yourselves aloof from outside influences or coming in contact with people who may be interested in this case. You may be excused until 2 o'clock.

An adjournment was accordingly taken until 2 p. m., Thursday, June 7, 1917.

2 p. m., Thursday, June 7, 1917.

FRANK LA BRANCH, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. CORKERY:

Q. State your full name.

A. Frank La Branch.

Q. Where do you reside?

A. Herrick, Idaho.

Q. Are you acquainted with the plaintiff, Mr. Chamberlain?

A. Yes, sir.

Q. I will ask you if you saw him there at the depot on the evening of November 15 last?

A. Yes, sir.

Q. Were you there when the west bound train pulled in?

A. Yes, sir.

Q. About what time did that train arrive there?

A. Between 7 and 8, I should judge.

Q. And what was the condition of the night there as to being dark or otherwise?

A. It was rather dark.

Q. When did you first see Mr. Chamberlain at that place?

A. Just as the train was about half a mile away.

Q. And did you have any talk with him there on the depot platform?

A. Just was going to shake hands with him as the train was coming, and he told me he was going to ride down a ways.

MR. KORTE: I move to strike that answer out as hearsay.

THE COURT: Yes.

MR. CORKERY: It might be a part of the occurrence there.

THE COURT: Oh no.

MR. CORKERY: Q. Just go ahead and tell what happened there.

A. Why, the whole night long, or-----

Q. Just the whole occurrence as you know it.

A. The train was coming, and he come up the track, and I was going to shake hands with him and bid him goodbye, and he said-----

Q. Not what he said to you, but just what occurred there.

THE COURT: What did he do?

A. He walked on by me, and by that time the train was coming around the curve, and I was looking up the track to watch the train come in, and I see him fall off the platform.

Q. You say he shook hands with you just prior to that?

A. Yes.

Q. After he shook hands with you what did you do?

A. I stood there and watched the train pull in.

Q. What other thing occurred as the train pulled in?

A. Then I went down to see how bad he was hurt. I straightened him up and seen a cut on his head, and felt to see if his arms or legs was broke. I couldn't tell whether they was or not, but I didn't think they was. I called for somebody to come down and help me, and my wife come down, and she held the lantern while I looked at his head, and then I told her to get up and get on the train with the kids, and the train was about to pull out, and I left him there, and as I was going I met a couple of fellows and told them to go and look after that man down there, that old Bart was hurt, and I went and got on the train myself.

Q. About how long did you see him and talk with him from the time you first noticed him until he fell off?

A. Not over a minute.

Q. What was the condition of that platform there that day?

A. It stood on that day just about like it stands now.

Q. What was that?

MR. KORTE: Its present condition, Your Honor, is immaterial. There is no question but that there was no railing there.

THE COURT: Upon counsel's statement to the

jury, I assume there is really no issue between you as to the platform at that time?

MR. CORKERY: In the pleadings it was-----

THE COURT: It was admitted in the opening statement, and I presume it is admitted now, that there was no railing there?

MR. KORTE: Yes.

MR. CORKERY: They also deny the maintaining of it as a station there after the removal of the depot.

THE COURT: You can go into that.

MR. CORKERY: Q. What was the condition of the grounds and depot there after the removal of the depot?

A. After the removal of the depot there was this platform left there.

THE COURT: That is conceded. There is no question of that.

MR. CORKERY: Q. Was there any station maintained by the company there after the removal of the depot? Was it maintained as any stop or station by the company?

A. It was.

Q. Just state what you know about that.

A. All I know is that I would get on the train and pay cash fare leaving there, and going to there I would buy a ticket.

Q. Leading to Herrick, you bought tickets leading to that point?

A. Yes.

Q. And you took the train-----

A. And paid cash fare when I left there.

Q. How frequently did you do that after the depot was moved?

A. After the depot was moved?

Q. Yes, about how many times have you done it?

A. Oh, not over six or eight times.

Q. What was Mr. Chamberlain's condition there as you observed him, as to being sober or not?

A. When I saw him he was sober.

MR. CORKERY: I think, if Your Honor please, that we should be permitted to show any statement of Mr. Chamberlain that he was about to take passage, to become a passenger, as the only possible method of showing his intention to become a passenger.

THE COURT: Well, I don't think it is highly important. However, if you-----

MR. KORTE: Pardon me, Your Honor. He is asking for the statement which Chamberlain made to the witness as to what he was going to do.

MR. CORKERY: I don't care about that. As to his intention, whether or not he had any intention-----

MR. KORTE: That is clearly hearsay. It is self-serving in the way that it is brought out this way.

MR. CORKERY: That is the only way we could show the intent.

MR. KORTE: It comes within the rule of self-serving declarations, Your Honor.

MR. CORKERY: I would suggest that these dec-

larations coming right at the vital time, when he didn't know he was going to be hurt or anything of the kind, would be very material, and we also want to show what he meant by handshaking,---that he intended to go on.

MR. KORTE: You brought that out yourself.

THE COURT: I think I will permit you to show it.

MR. CORKERY: Q. State what statement he made in that connection about going on the train or intending to go on the train.

MR. KORTE: We object as hearsay and self-serving and incompetent.

THE COURT: The objection is overruled. You may have an exception.

Q. What did he say as he shook hands with you?

A. He said he was going on through with me a ways on the train, as far as Plummer junction.

MR. CORKERY: That is all.

CROSS EXAMINATION by

MR. KORTE:

Q. You say you saw him just that moment of time that you attempted to shake hands with him, and he said he was going along with you?

A. I see him when he got off the speeder, from the house.

Q. And he was drunk then?

A. No, sir, not that I know of. I wasn't over there.

Q. But this particular time when you saw him on

the platform, when you were about to take the train, was just a moment of time, wasn't it?

A. Yes, sir.

Q. How do you know he was sober then in the dark?

A. Because I was going to shake hands with him, and by all appearances he was sober.

Q. That is all you know about him, is what you saw of him in the dark and what you said to him and what he said to you, as you have stated here?

A. Yes, sir.

Q. I wish you would examine Defendant's Exhibit No. 1, for identification, read it over fully, and state whose signature is at the end of it, if you know.

(Paper marked DEFENDANT'S EXHIBIT NO. 1.)

MR. CORKERY: Are you asking for the signature?

MR. KORTE: Yes.

MR. CORKERY: Just look at the signature, I will suggest.

MR. KORTE: I asked him to read the contents over and identify the signature. I am cross examining him, Your Honor.

MR. CORKERY: We object, of course, to showing anybody else's signature. If it is some statement he signed it might be proper, but as to anybody else's I don't think it is proper.

MR. KORTE: Just let him read it. He is getting along all right.

Q. Is that your wife's signature?

A. Yes, sir.

MR. CORKERY: We object to that and move to strike the answer, as being entirely immaterial.

MR. KORTE: Q. Your wife was present-----

MR. CORKERY: Just a moment. I would like to have a ruling.

THE COURT: The objection is overruled.

MR. CORKERY: An exception.

MR. KORTE: Q. Your wife was present on the platform there at the time you shook hands with him, as you claim?

A. Yes, sir.

Q. And the boy named Greenwood was there, was he, with you?

A. I don't know the gentleman.

Q. Do you know a little boy by the name of Greenwood?

A. No, sir.

MR. KORTE: Will you stand up, son? (Boy stood up in court room.)

Q. Do you know that boy?

A. Yes, sir, I know the boy.

Q. He was there on the platform with you?

A. I don't remember seeing him.

Q. He went down below with you and your wife when you went down to see what happened to Chamberlain?

A. I come down there while he was there.

Q. And he carried the lantern down?

A. No, sir; my wife carried it down.

Q. He was down there with you and your wife?

A. He come down there after I was there.

Q. And you told him to get some men to take care of Bart Chamberlain, that you had to catch your train, that the train was then in?

A. I don't remember telling him that.

Q. But anyway you found Bart Chamberlain sitting on either a trunk or a box when you went on the platform?

A. No, sir.

Q. And after reading this statement over do you still insist that Bart Chamberlain was not drunk?

A. Yes, sir.

MR. CORKERY: We object to that. It is an obvious attempt to inject into this case somebody else's testimony. If they want the wife's testimony let them call the wife.

THE COURT: The form of the question is objectionable. You may ask him whether he still insists-----

MR. KORTE: Q. Do you still insist on saying that Bart Chamberlain was not drunk, after reading that statement over?

MR. CORKERY: I object to that last part.

THE COURT: Sustained.

MR. KORTE: Q. Now you were at Marble Creek too that day, wern't you?

A. No, sir.

Q. Your brother was?

A. Yes.

Q. Wallace?

A. Yes.

Q. Do you remember when he came down on the motor car with Chamberlain and the other man, whoever he was, or two men?

A. Yes.

Q. You remember when he came on the platform there, or wherever it was where they unloaded him?

A. I never seen him get off.

Q. And you came down there and chided your brother because he was drunk?

A. No, sir.

Q. And that you had the things ready to go and that you were ready to take the train, and that he, being in that condition, you would probably be unable to take the train,---you never had any words like that with your brother?

A. No, sir.

Q. How near were you to Bart Chamberlain at the time he came off the motor car at the time he and your brother and the other men came down there?

A. From my house to the platform, about a hundred and fifty yards.

Q. You had taken your things down to the platform to be put on the train?

A. Yes.

Q. And those were the boxes that were there to be put on the train?

A. Two trunks.

Q. No boxes?

A. I didn't have none.

Q. Were there any there?

A. I never seen any.

Q. So, whatever was there, there was two trunks?

A. Yes, sir.

Q. When you were bidding him goodbye, as you say, your wife was on the platform?

A. Yes, sir.

Q. And your brother Wallace?

A. Well, I don't know whether he was or not.

Q. Where is Wallace now?

A. He is in Oregon.

Q. And who else was on the platform besides you two and Chamberlain?

A. Well, sir, I don't know. There was somebody else but us there, but I don't know who they were.

Q. Did they take the train or not?

A. I couldn't tell you.

Q. You went away that night with your family back to your home at Salem, Oregon?

A. We went to Spokane that night.

Q. And then to Salem, Oregon?

A. Yes.

Q. And then you remained there in Salem, Oregon, how long?

A. About four months.

Q. And you came back into the Marble Creek country alone and left your wife and children at Salem, Oregon?

A. No, sir, I went on the Columbia River and worked.

Q. I mean you got back into the Marble Creek country alone, and left your wife and children at Salem, Oregon?

A. Yes, sir.

Q. And when did she come to the Marble Creek country and meet you?

MR. CORKERY: We object to that as immaterial.

MR. KORTE: It will be material, Your Honor.

THE COURT: Overruled.

A. How long has it been since she has been back?

Q. Yes, at Herrick, where you are now living.

A. I think it is four weeks today.

Q. And when she came back, I will ask you whether or not you didn't have this talk, that she said to you that she had given this statement which I have shown you, that you told her, chided her for telling the truth, and that she was told to tell the claim agent of the railroad that what she had put down in this statement wasn't true,---did you have that talk with your wife?

A. No, sir.

Q. What time did you see Bart Chamberlain, or what time was it that this motor car arrived at Herrick?

A. It was between 3 and 5, I should judge.

Q. You don't know whether it was nearer 5 than 3, do you?

A. No.

Q. You wouldn't want to be certain about it?

A. No.

Q. And this train, in order to get on at that place you had to flag it this night with the lantern?

A. I don't know whether anybody flagged it or not.

Q. Didn't they have a lantern there for that purpose?

A. They had the lantern there for that purpose, but the lantern was sitting in between-----

Q. This place at Herrick was what you would ordinarily call a flag station, since the station was moved?

A. You wouldn't exactly call it that, because if they see people standing on the platform it will stop.

Q. And when it is dark you would have to flag them with a lantern or something of that kind?

A. Yes, sir.

Q. I will ask you whether or not Wallace was not drunk at the time he came down there with Bart Chamberlain on that speeder that day when you met them?

A. I couldn't say that he was.

Q. You wouldn't say he wasn't?

A. I couldn't say he wasn't when I was over to the house.

Q. He had liquor in him, didn't he?

A. I couldn't say that he did.

Q. Don't you know he had been drinking?

A. No, sir.

Q. Do you know when a man has liquor in him?

A. Yes.

Q. Haven't you seen a man under the influence of whiskey?

A. Yes, sir.

Q. So that you are able to tell?

A. Yes, sir.

Q. You say your brother had no liquor in him when he got off of the motor car or speeder?

A. He didn't look like it to me.

MR. KORTE: That is all.

MR. CORKERY: That is all.

OWEN D. PLATT, produced at a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. CORKERY:

Q. State your full name, Doctor.

A. Owen D. Platt.

Q. You are a physician and surgeon?

A. Yes, sir.

Q. Residing where?

A. St. Maries, Idaho.

Q. From what university did you graduate?

A. The University of Nebraska.

Q. The medical department there?

A. Yes, sir.

MR. KORTE: We will admit that the doctor is competent.

MR. CORKERY: Q. You have been in the general practice in this State?

A. Yes, sir.

Q. And also have a general hospital up there?

A. Yes, sir.

Q. Did you care for Mr. Chamberlain when he got hurt, along about the fifteenth of November, or shortly after?

A. Yes.

Q. Where did you first see him after he got hurt?

A. I saw him at St. Maries on the sixteenth of November.

Q. Was he brought down there to your place?

A. Yes.

Q. What time of day, do you remember, that he was brought in on the sixteenth?

A. He was brought in on a caboose. I think he came in about 3 o'clock. I wouldn't be sure as to the time.

Q. How did they bring him in from the caboose, do you remember?

A. He was on a stretcher in the caboose, but I had a wire to meet the caboose at the first street crossing, and we packed him out on the stretcher and put him in an automobile and hauled him up two blocks to the hospital.

Q. Did you make an examination after he came to the hospital?

A. Yes.

Q. How shortly after he came did you make the examination?

A. As soon as we got him ready.

Q. State the condition that you found that man in at the time of that examination.

A. In regard to injuries?

Q. Yes.

A. Well, he had a dislocated right shoulder, and some fractured ribs, and skinned up and bruised up about the head and shoulders and arms.

Q. Just take the shoulder there. Was there any breaking of bones about the shoulder?

A. I think the joint was broken where the bone was dislocated.

Q. State his general condition as to strength or weakness when you examined him, and general bodily vitality.

A. Well, of course, you couldn't tell very much about that. He was pretty sick and more or less delirious at that time.

Q. How long did that delirious condition remain?

A. About six or seven days.

Q. And state how many ribs were involved in the fractures or breaking.

A. As near as I could make out, there was three fractured ribs, two of them in front and one back.

Q. Were any of these three ribs broken in more than one place, or fractured in more than one place?

A. I think not.

Q. Just take each rib, if you can, and tell where the fracture or break was.

A. The sixth and seventh ribs were fractured in front, at what they call the cartilagenous attachment, and the eighth rib was fractured posteriorly.

Q. Now, Doctor, was there any pressure by those broken ribs upon the lungs, in your opinion?

A. Yes, sir, I think there was at the time.

Q. What did that pressure result in?

A. It resulted in the development of pneumonia in a few days.

Q. Anything else?

A. The pneumonia was followed by an abscess of the lung.

Q. State how you know there was any abscess there.

A. About the sixth or seventh day he was there the abscess ruptured into the bronchial tubes and he spit up the pus.

Q. Can you tell the jury,---on those sixth and seventh days, you say it was one of those two different days?

A. It started on the sixth or seventh day; I don't remember just which.

Q. How long did it continue?

A. He was spitting up pus more or less during all the time he was in the hospital. It wasn't entirely cleared up when he left.

Q. During those first two days after it broke, how much pus would you say he spit up during those first two days?

A. I should say at least a quart or a little more.

Q. All together or at several times?

A. Several times.

Q. Just take in two days, how much would you say he spit up?

A. I should judge a quart or a quart and a half.

Q. On each day?

A. That is the entire amount for the first two or three days.

Q. Was this spitting continuous or did it come all of a sudden?

A. Well, it would stop at intervals, and then come quite an amount at a time.

Q. At the first was there any blood in this corrupt matter that was spit out?

A. Well, he spit bloody sputum before this abscess ruptured. There was no blood mixed with the pus.

Q. State whether his condition was serious or not serious at the time you examined him.

A. It was pretty serious at that time.

Q. How serious?

A. Well, I didn't think there was a chance of him getting well.

Q. How long did he remain at the hospital?

A. He was there three weeks.

Q. After that, Doctor, where did he go?

A. He went down to his nephew's.

Q. Did you attend him there?

A. No, I didn't attend him there, but I did attend him. He would get up to town on the boat afterward. He had his arm bandaged up and his ribs put up.

Q. About what length of time was he under treatment, combined, while he was in the hospital and after he left?

A. He has been under my treatment off and on ever since the injury.

Q. Is he still under your treatment?

A. Yes, sir.

Q. Judging from the examination that you made at the time he first came to the hospital, together

with the other examinations that you made in attending him, and also taking into consideration the fact that he fell a distance of ten or fifteen feet from a platform, and in his present condition, the last time you examined him, what would you say as to whether his condition with reference to the shoulder is permanent or not, the injury there?

MR. KORTE: That, Your Honor, is objectionable. The Doctor can give the facts, rather than his opinions.

MR. CORKERY: He said he attended him right up to date.

Q. I will just ask you an additional question. Did you examine him today?

A. No, sir.

Q. Were you present at his examination?

A. Yes, sir.

Q. Now go on and state whether or not this condition is permanent, as to the shoulder?

A. What?

Q. Is the injury to the shoulder which you described there a permanent injury or not?

A. Yes.

Q. You mean by that what,---that it is permanent?

A. Yes, sir.

Q. Now answer the same question, taking into consideration the same facts,---I will ask you as to whether or not the injury that you have spoken of, to the lung and to the ribs there,---I mean now particularly the ribs as it affects the lung there,---whether

that injury to the lung, or the condition of the lung is permanent?

MR. KORTE: That is assuming something that don't bring out the facts. It seems to me the doctor could tell what his present condition is. I object to the question.

WITNESS: I could tell that too.

THE COURT: I hardly know what you mean by asking whether a condition is permanent. Of course any fracture of a bone is permanent in one sense.

MR. CORKERY: I will withdraw that, and ask a question that will clear that up.

Q. What would you say his present condition is as to his lung?

A. Well, as a result of that pneumonia and that abscess in the lung, there was more or less adhesions formed between the pleura and the lung, that are permanent.

Q. Just describe what you mean by adhesions between the pleura and the other part of the lung there, that you speak of.

A. I don't know that I can do it very well. In any condition where there are two surfaces together, if there is an inflammatory condition takes place, bands of fibrous tissue will form between those, and they call that adhesions.

Q. Now I will ask you, taking into consideration the facts, that he fell this distance of ten or fifteen feet from this platform, together with your first examination, and your subsequent attendance upon him, and the facts you learned there, and taking into

consideration his present condition, as you have described it, will this condition in all reasonable probability continue to be permanent as to the lung?

A. Yes, sir.

Q. What was your bill there up to date against this man, hospital and doctor bill?

A. One hundred fifty-five dollars.

MR. CORKERY: You may cross examine.

CROSS EXAMINATION by

MR. KORTE:

Q. Dr. McCarthy examined him today noon, did he not?

A. Yes, sir.

Q. And you were present?

A. Yes, sir.

Q. And at that examination, Doctor, you went into the mobility of his lungs, did you not?

A. I did not.

Q. Did Doctor-----

A. Yes.

Q. And he marked it with indelible pencil?

A. Yes, sir.

Q. And found them normal?

A. He might have found them normal. I examined him last week, and I didn't find them normal when I examined them.

Q. And you also found the mobility of the shoulder-----

A. Lessened.

Q. Isn't the man in a fine physical condition for a man of his age at this time, Doctor?

A. He has got a good shoulder for the injury he received at the time.

Q. That is the broken part you spoke of?

A. Yes, but he has less mobility of the shoulder joint at the present time.

Q. He could get his arm up over the head, could he not?

A. Yes, but not easily.

Q. Didn't he take his shirt off and show the mobility of the shoulder?

A. He took it mostly off with the left arm though.

Q. You took no X-rays of the ribs at all?

A. No, sir.

Q. It is a difficult thing to determine a fractured rib without an X-ray, isn't it?

A. No, sir.

Q. You think it is an easy matter?

A. Easy, very easy.

MR. KORTE: That is all.

MR. CORKERY: That is all.

CHARLES E. McDOWELL, produced as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. CORKERY.

Q. State your full name to the jury.

A. Charles E. McDowell.

Q. And you reside where?

A. Well, Marble Creek.

Q. You are acquainted with Mr. Chamberlain, the plaintiff?

A. Yes.

Q. Did you see him upon the day of the fifteenth of November last?

A. Yes, sir.

Q. Where did you first see him upon that day?

A. I see him at Olson's store, in Marble Creek.

Q. In Marble Creek?

A. Yes, sir.

Q. That is on the Milwaukee line?

A. Yes, sir.

Q. And about what time of the day did you see him there?

A. Oh, 11 o'clock, around there.

Q. And did you come on down to Herrick with him?

A. Yes, sir.

Q. And what time did you arrive at Herrick?

A. On, around 4 o'clock, between 3 and 4.

Q. And did you see him later again that day?

A. Just once.

Q. Where?

A. When I went out to gather him up.

Q. Where did you find him then?

A. Laying down beside the platform.

Q. Will you describe the condition of the place where you found him?

A. It was off from the platform at a place between the two tracks, probably around between eleven and thirteen feet fall.

Q. Down from the platform?

A. Yes.

Q. What was the condition of that place there, twelve feet down, the bottom of it, what was the condition of it, as to being smooth or containing obstacles?

A. Well, there were logs laying there.

Q. Anything else?

A. Two or three logs, stumps.

Q. Any rocks in there?

A. Rocks, yes, sir.

Q. And you found him there about what time?

A. After the train, westbound train left.

Q. About what time was that?

A. Well, between 7 and 8, I guess,---around 7.

Q. The train pulled in at that time?

A. Yes.

Q. And you found him about how long after the train pulled in?

A. Probably five to eight minutes.

Q. Now what condition was he in when you found him?

A. Well, he was knocked out.

Q. Was he conscious?

A. No, I couldn't say he was; he couldn't talk.

Q. Did you attempt to talk with him?

A. Tried to, but there was no use.

Q. What did you do with him, if anything?

A. Picked him up and tried to take care of him.

Q. What did you do?

A. Took him---went to take him to the hotel, and there wasn't room, and we put him in a house beside it.

Q. Did you see him fall? Were you at the station when he fell?

A. I was not.

Q. Where were you then?

A. Over in the hotel.

Q. What attracted your attention to the man?

A. This small boy came running over and told us that there was a man hurt, and, of course, we went over.

Q. Now, what was Mr. Chamberlain's condition, as far as you observed him, from the time that you came from Marble Creek down during the day and the time you found him there in the evening, what was his condition as to being sober or not?

A. I should say he was sober.

Q. You got off of the speeder at Herrick?

A. I did.

Q. What did Mr. Chamberlain do at that time, if anything?

A. He said, "I am going away-----"

MR. KORTE: I object to that, Your Honor, as being remote.

THE COURT: When was that, at what time?

MR. KORTE: When they got off the speeder at 4 o'clock.

THE COURT: The objection is sustained. The answer will be stricken out.

MR. CORKERY: The question was, what did Mr. Chamberlain do, in which direction did he go after getting off the speeder, if you observed?

A. I turned around and went off the platform, to

go home. He says, "I am going home," and he turned and went off the platform the other way.

Q. Which way did he go?

A. He went across the platform and over the track.

Q. Did he go in the direction of his home?

A. Yes, in that direction.

MR. CORKERY: That is all.

CROSS EXAMINATION by

MR. KORTE:

Q. Who was there at Marble Creek with you, Mr. McDowell, with you and Chamberlain? Who else was there at Marble Creek at 11 o'clock, about the Olson store?

A. I suppose some of the Olson family were there.

Q. Well, give us some of the lumber jacks.

A. I couldn't tell you any.

Q. You didn't know anyone there then except yourself and Chamberlain, was that all you knew there?

A. Well, in the store I never paid no attention to who was there.

Q. Who did you see around there, that is the point,---anyone you knew? Did you know anyone around there, of the men, either working in the woods or on the railroad or anywhere else?

A. At that immediate time, you mean?

Q. Then or after, before you started down home.

A. While I was there I had met everybody around Marble Creek at one or some time during the morning.

Q. Who were they? Give us the names.

A. Well, such as Glover, and if Olson was there I met him, and I see Mr. Hodges, and probably Mr. Kirk there at the depot as I went around.

Q. Give us a few lumber jacks now, if you can.

A. I couldn't name any.

Q. Were there any that you didn't know?

A. There weren't any that I did know or didn't, that I can refer to.

Q. So that the only persons you saw at Marble Creek on that day are the ones you just mentioned, is that right? You saw Wallace La Branch there, didn't you?

A. I don't recollect of seeing him. He may have been there. I didn't run into him.

Q. You didn't see him at all that day, did you?

A. I don't recollect seeing him.

Q. All that day?

A. I may have in the morning. You were referring to in the morning?

Q. I am speaking of Wallace La Branch. Did you see Wallace La Branch, the brother of Frank La Branch, at Marble Creek, at noon, or any time in the afternoon, at Marble Creek?

A. If it was Wallace La Branch-----

Q. Answer the question, or can't you do it without explanation? You know Wallace La Branch, do you not, or did know him at that time?

A. Well, I couldn't say whether I knew Wallace or Frank separate, but one of the boys came down on that speeder.

Q. Was it this one here that just testified?

A. I couldn't tell you.

Q. Why do you hesitate about telling us?

A. Because I don't know.

Q. Can't you remember a man's face when you see it?

A. I didn't pay that much attention to it.

Q. You have been around Marble Creek and Her-
rick for a number of years, haven't you?

A. Long enough, yes.

Q. And you have been there during all the time
that the La Branch boys were there?

A. Never in close contact with them.

Q. Anyhow, whatever La Branch it was, one of
them came down on the motor car or speeder with
you and Bart Chamberlain in the afternoon?

A. Yes.

Q. And you flagged the motor car some distance
out from Marble Creek, to get on it, the three of you?

A. No, sir.

Q. Where did you get on the motor car?

A. I got on the motor car at Marble Creek.

Q. At the station?

A. At the motor house.

Q. Where is that with reference to the station,
west or east of it?

A. West.

Q. How far west?

A. A hundred and twenty-five yards.

Q. A hundred and twenty-five yards?

A. Yes.

Q. And at that same time when you got on, this La Branch boy or man and Chamberlain got on, did they not? The three of you were there together, going down the track?

A. I think so. I wouldn't just say for sure.

Q. Why do you say "I think so."?

A. I wouldn't just say for sure whether La Branch got on at the time I and Bart did.

Q. Anyhow, the three of you came up together, on the track, at one time, either on the speeder, or when?

A. Yes, sir.

Q. And you were together when you were at Marble Creek, before you got on the speeder, the three of you?

A. No, sir.

Q. And this La Branch was drinking, wasn't he?

A. Not that I know of. We weren't together.

Q. Did you see him drink at all at Marble Creek?

A. No, sir.

Q. Did you see Bart Chamberlain take a drink?

A. No, sir.

Q. Did you see him with a flask, or the La Branch man with a flask of whiskey, when they got on the motor car and rode down to Herrick?

A. No, sir.

Q. You say they took no drink on the motor car at all, to your knowledge?

A. Not to my knowledge.

Q. Could they have taken it without you knowing it?

A. I hardly see how.

Q. Didn't they load the La Branch man, because of him being drunk, on the side or in the trough of the motor car, where they keep the tools, on account of his being drunk?

A. No, sir.

Q. He sat on the motor car, did he?

A. Yes.

Q. Where?

A. I think he was sitting on that board or space, whatever it is put there for.

Q. And when you got further down the track you run on to Black Joe and picked him up?

MR. CORKERY: I object to that as improper cross examination, and also for the further reason that we had nothing to do with Black Joe or his intoxication or quarrel there. It doesn't prove that this plaintiff was in any such condition.

THE COURT: Overruled.

MR. KORTE: Q. You picked up Black Joe?

A. Yes.

Q. He was drunk?

A. They did.

Q. He was drunk?

A. I couldn't say.

Q. It is hard for you to tell when a man is drunk, is it?

A. I didn't pick him up, sir.

Q. I asked you whether he wasn't drunk or not.

A. I couldn't say.

Q. You wouldn't say whether in his condition he was drunk or not?

A. No, I couldn't.

Q. What was his condition?

A. Well, it seems he takes fits of some kind, and I couldn't say whether he had a fit—

Q. You have known Black Joe there for years, haven't you?

A. I have heard them talk about him.

Q. And you have met him?

A. I have met him, yes.

Q. Isn't it because he gets whiskey into him that he has these fits?

A. I couldn't say.

Q. You then had the two motormen, yourself, one of the La Branchs, Bart Chamberlain, and Black Joe on the car going on to Herrick?

A. No, sir.

Q. How did you get down?

A. They took two of us, I guess, took Black Joe down to his place just a little ways.

Q. He didn't go to Herrick at all, did he?

A. No, sir, not on the car.

Q. You wouldn't say whether he got to Herrick or not?

A. No, I would not.

Q. What two did they take to Herrick? Were you one of them?

A. Yes, sir. I went the whole way.

Q. Who was the other one?

A. Mr. Chamberlain.

Q. What became of the La Branch man?

A. He rode on down.

Q. And he came and got off at the platform with Chamberlain and yourself.

A. I think so.

Q. And the other brother then came down to the platform didn't he?

A. I didn't see him.

Q. You went on then toward your home?

A. I went right toward where he would come from, if I had seen him.

Q. You went up toward the hotel then?

A. Yes, sir.

Q. And stayed there that night?

A. Yes.

Q. And, of course, when you say the time when the train got in there, the time when the motor car got in there, it is just simply your recollection about it?

A. It was somewhere about 4 o'clock. I am not positive of the minutes.

Q. You wouldn't say whether it was 4 or 5?

A. It was closer to 4 than it was to 5.

Q. It was after 4?

A. Yes, sir.

Q. And the same thing with reference to the train, you say it came in between 7 and 8. Was it closer to 7 than 8?

A. Closer to 7.

MR. KORTE: That is all.

RE-DIRECT EXAMINATION by

MR. CORKERY:

Q. Was that station there maintained by the company as a station after they moved the depot,

picking up passengers and discharging passengers, do you know?

A. Yes, sir.

Q. Did you take passage there at any time after the depot was moved?

A. Just the other evening.

Q. Well, between the date of moving the depot and around about the time of the accident, did you board trains there, or see people board them, and get off.

A. Two days after the accident I went back to Marble Creek on the train.

Q. Do you know of your own knowledge whether tickets were sold to that point by the company, at about that time?

A. I think they were.

MR. CORKERY: That is all.

WITNESS: I am positive.

RE-CROSS EXAMINATION by

MR. KORTE:

Q. What is your business, Mr. McDowell?

A. Just a common working man.

Q. How long have you been in the Marble Creek country?

A. Since 1912.

Q. And you go back and forth from St. Maries to Marble Creek a great deal?

A. Yes, sir.

Q. Are you a member of the organization known as the I. W. W.?

A. I am not.

MR. CORKERY: We object to that, if the Court please. It is for the obvious purpose, without any foundation of fact, to prejudice this jury, and I ask the Court to instruct counsel—

MR. KORTE: I have a right to ask that question.

MR. CORKERY: Oh, it wasn't in good faith.

WITNESS: No, it wasn't.

MR. KORTE: That is all.

MR. CORKERY: That is all. We rest.

MR. KORTE: I will call Mr. Hodges.

KENNETH R. HODGES, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. KORTE:

Q. Give your full name to the jury.

A. Kenneth R. Hodges.

Q. How old a man are you?

A. Twenty years old.

Q. Where do you live?

A. Auburn, Washington.

Q. What is your business, Mr. Hodges?

A. Feed and grain.

Q. Did you say how old you were?

A. Twenty.

Q. You are engaged in the business of feed and grain at Auburn, Washington?

A. Yes, sir.

Q. At one time you worked for the Milwaukee railroad, the defendant in this case?

A. Yes.

Q. At what business?

A. In the signal department.

Q. Between what points were you working and where were you located?

A. The Idaho division and Coast division and Columbia River.

Q. Where were you stationed at times? Do you recall being stationed at Marble Creek, on the line, in 1916, in October and November?

A. Yes, sir.

Q. Do you know Bart Chamberlain, the plaintiff in this case?

A. Yes, sir.

Q. Do you remember an incident when he fell off of the platform at Herrick?

A. Yes, sir.

Q. And was injured. Do you recall seeing him on the day that he was hurt, at Marble Creek?

A. I do.

Q. Where did you see him around Marble Creek? Tell the jury in the first place about how many inhabitant or buildings there were at Marble Creek.

A. The inhabitants and buildings of Marble Creek are comprised of a store and restaurant, a warehouse, and railroad employes' shanties and residences.

Q. What time of day was it when you first saw him there on the fifteenth of November?

A. I think around about noon, if I remember right.

Q. Who did you see with him, if you remember?

A. Why, a man by the name of La Branch, and Mr. Glover, and another gentleman,—I don't know his name; he is a short fellow they call Mickey.

Q. Did you see any other men around there that you didn't know by name?

A. There was some men from the woods there, but I don't know their names only by nick-names. One was Andy and another one was Hank, and I don't remember their last names.

Q. When you saw them around there, about how long was it that you observed Chamberlain with these men about Marble Creek?

A. The question again, please.

Q. About how long a time was it that you saw Bart Chamberlain there at Marble Creek with these other men during that day?

A. Around about noon, at Marble Creek.

Q. Well, what length of time was it that you noticed them?

A. Oh, I should judge they was there together talking to each other among themselves for about an hour or an hour and a half.

Q. Did you see Chamberlain drinking whiskey there with those men at that time?

MR. CORKERY: We object to that as leading and suggestive.

MR. KORTE: It is almost necessary for me——

THE COURT: Overruled.

A. Why, not right at the store there.

Q. Tell the jury what you saw by way of drink-

ing whiskey, if there was any drunk there, by Chamberlain or the others that he was with.

A. Not right in the Marble Creek store there, no, sir.

Q. Anywhere about Marble Creek, before you started away.

A. Yes, along down toward the right of way I saw a bottle passed around several times among these gentlemen.

Q. Tell the jury whether or not you saw Chamberlain drink from the bottle.

A. Yes, I did.

Q. How often, about?

A. Oh, I can't say; several times.

Q. Do you recall taking lunch or dinner at dinner time at Marble Creek?

A. Yes, sir. I ate my meals there at the restaurant.

Q. Were the rest of those men and Chamberlain there too at the time?

A. Yes.

Q. Was there any drinking going on at that time by him with them?

MR. CORKERY: It is all leading and suggestive, if Your Honor please.

THE COURT: Yes, I think that is leading.

MR. KORTE: Q. What was there going on at that time at the lunch counter or otherwise, with reference to drinking whiskey or coffee or what?

A. From the appearances of drinking——

MR. CORKERY: We object to the appearances.

THE COURT: It may be stricken out.

MR. KORTE: Q. What were they doing?

A. Talking and arguing among themselves about different matters. I didn't pay much attention. I was eating.

Q. What did you do at any time in the afternoon, going west on your motor car to do your work, and when was it you started, and where did you start from?

A. I should judge it would be about along a little before 4, we had a case of trouble that was down just about at that bridge over Big Creek, below Herrick.

Q. That would be a little west of Herrick?

A. Yes, sir. It was a case of just temporary repair, and we couldn't make a permanent repair.

Q. What time was it that you started out from Marble Creek to look up this trouble?

A. Just a few minutes before 4, around 4 o'clock.

Q. Did you notice whether or not Chamberlain was at Marble Creek or had left?

A. They was down the track west of the station.

Q. When did you notice him going down the track, and who was with him, if you know, when they left to go down the track?

A. This was along about 4 o'clock, and about ten minutes before that I started down to the tool house to get the car, down the right of way to the west of the station.

Q. You started down, as I understand, to get the car?

A. Yes.

Q. Tell the jury where the car was?

A. At the station—the tool house is right next to the station there, west, I should judge, a hundred yards probably.

Q. Who did you see on the track when you went down to get the car?

A. Mr. La Branch there, and Mr. McDowell.

Q. Can you tell whether or not Chamberlain was there?

A. There was Mr. La Branch, Mr. Chamberlain, and Mr. McDowell, and one of these men from the woods, named Mickey, I believe it was.

Q. Which way were they going, or were they going any way,—standing still or moving?

A. Toward Herrick, west.

Q. What did you do then with reference to getting on your motor car and getting it out to go west? Just tell in your own way what you did.

A. We started out and picked these men up between Marble Creek station and Pokono siding.

Q. How far is Pokono siding from Marble Creek?

A. Just a little ways; I should judge half a mile or a quarter of a mile.

Q. How did you come to pick these men up there?

A. They had been drinking, and we thought it would be a good idea to take them along.

Q. Go ahead and tell when you came to them what you saw by way of drinking, and what they had with them.

A. What they had to drink was some kind of whiskey, I should judge.

Q. What was it in?

A. It was in a flask. I don't know whether it was a pint or a half pint flask.

Q. What did they do with it?

A. They were passing it around and each taking a drink, that is, all except one man.

Q. Who was that, that didn't take a drink?

A. I didn't see him take a drink every time. That was Mr. McDowell.

Q. Did you see Chamberlain take a drink?

A. Yes, sir.

Q. How often?

A. I can't swear to the number of times. I don't know that he refused any time.

Q. What difficulty did you have in getting them on the speeder?

MR. CORKERY: We object to that as leading.

THE COURT: Yes.

MR. KORTE: Q. What did you do by way of getting them on the speeder?

A. There was one man, Mr. La Branch, we put him in the tray of the car; that is the place for extra tools or anything we want to carry.

Q. Just describe how you put him on that tray?

A. It was very awkward to get on for a sober man, let alone a man that has had liquor. You have to step over two or three pieces of iron. And Mr. Chamberlain went on the rear of the tray, in a tool box.

MR. CORKERY: You say he got on there?

A. Mr. Chamberlain?

MR. CORKERY: Yes.

A. I put Mr. Chamberlain on the rear of the tray, and this man Mickey rode right behind me. Mr. Ernster was on the rear, of course. And Mr. McDowell, I think, was either in the middle of the tray—I am not sure—or between Mr. Ernster and Mickey.

Q. Where did you go when you got them loaded?

A. Started out for Herrick, west.

Q. What did you come to on the way down?

A. We got as far as the end, the west end of the Pokono siding, just around the curve, and we run on to Black Joe and another man there, and it seems that Black Joe had been drinking and had got into one of his fits, and this lumber jack, the way he told us,—when we stopped—he flagged us down,—they had just pulled him off a couple of minutes—

MR. CORKERY: We object to what the other man said.

A. And this man that pulled Black Joe off wished we would take him on down with the load, on as far as his house anyway. But we couldn't do it right then, because we was due to meet a freight then, and we told him we would go on up around the curve, where there was a set off, and we would come back and take him on, as soon as we could, and we did, as soon as the train went by, and when we got back there was a couple of the men,—I think Mr. McDowell and Mickey—I think, took him down to his home. His home lays on a tangent with the Milwaukee track. In the meantime we got set on and started,

and Black Joe come running across the field with his rifle. He could easily beat us to the right of way and we stopped the car, and Mr. Ernster was running the car at the time, and he refused, and we stopped, and some of the men went out ahead and took the rifle away from him, and shot three or four shells out of it. By this time we was pretty near Herrick, and we took Black Joe along with us, and put him in the tray, if I remember right, and we hit a tunnel just before reaching Herrick, and did not like to go through with this load on, and there were two or three to watch aboard, and in case of quick acting they would be in the way, and I am not sure just who we left, but I think we took Wallace La Branch down, and Mickey, first, and then I think we come back and picked the rest up and took them on to Herrick.

Q. Where did you unload them?

A. At the platform at Herrick.

Q. Where did you unload Chamberlain?

A. At the platform at Herrick.

Q. When he got off there how did he walk?

A. An unsteady walk.

Q. Did he remain or not on the platform?

A. As near as I can remember, he went off and sat down, or kind of leaned on these trunks, or whatever was on there, boxes or trunks.

Q. You have seen drunken men in your day, have you?

A. Yes, I think I have.

Q. Tell the jury whether or not when you unloaded Chamberlain on the platform, whether or not he was drunk.

MR. CORKERY: We object to that.

THE COURT: Was he or was he not drunk?

A. Yes, sir, I think he was.

MR. KORTE: Q. Then where did you go, after you unloaded them?

A. We went just a little bit west, to where this trouble was, but on looking at our watches and comparing notes we found out if we would hurry back as fast as we could go to Marble Creek we could beat No. 17 in.

Q. Did you beat 17 in or not?

A. No, sir, we got as far as Pokono siding, and got held up by a freight there.

Q. You are not working for the Milwaukee railroad at this time?

A. No, sir.

Q. How long since have you not been working?

A. I think around February 28,—I am not sure—of this year.

MR. KORTE: You may take the witness.

CROSS EXAMINATION by

MR. CORKERY:

Q. You left that particular work up there, that was the last work you did, signal work, in the vicinity of Marble Creek?

A. No, sir.

Q. How did you happen to know all these people by their first names, so well acquainted with them?

A. Marble Creek was our headquarters. I eat there and stayed there nights.

Q. And you knew all these men pretty well, didn't you?

A. Quite a few by sight and a few by name.

Q. Now you say that you saw these men at the depot in Marble Creek before you started out?

A. No, sir, I did not say I saw them at the depot.

Q. Well, or about the depot?

A. Not right near it, no, sir.

Q. Where did you first see any of them on that day?

A. At the restaurant.

Q. At the restaurant eating lunch?

A. I was eating lunch when I saw them. They was not eating.

Q. What were they doing?

A. They was talking around there and arguing.

Q. Talking in the restaurant?

A. Yes, sir.

Q. All in the restaurant when you saw them?

A. Yes, sir, as near as I can remember.

Q. When did you see them again?

A. On the Milwaukee right of way.

Q. How long afterward?

A. Oh, I should judge it was an hour and a half altogether from the time I first seen them until they was on the Milwaukee railroad.

Q. You saw them on the right of way when you picked them up?

A. Yes, sir.

Q. And you didn't see them any time excepting at the restaurant, you didn't see them at any other time or other place, excepting on the right of way, when you picked them up, is that correct?

A. Yes.

Q. You say in the restaurant you didn't see anybody take a drink that you could swear to, did you?

A. Not while I was eating, no, sir.

Q. While they were in the restaurant or you were in the restaurant you didn't see anybody take a drink that you could swear to, that was in this crowd?

A. Not that I remember, in the restaurant part.

Q. So any drinks you saw anybody take would be after you picked them up on the right of way, is that right?

A. Not necessarily.

Q. Answer my question. Is it true or isn't it?

THE COURT: Did you see them take any drinks other than those which they took after you picked them up?

A. Yes, sir.

MR. CORKERY: Q. Where was that?

A. That was on the way down to the right of way.

Q. Just before you picked them up?

A. They just went out of the door of the restaurant.

Q. That is what I understand you to say, that you saw them at the restaurant, and you didn't see them again until an hour and a half, until you picked them up on the right of way, isn't that true?

A. That is the case.

Q. During that hour and a half of time you didn't see them, did you?

A. The hour and a half, I believe, comprises from the time I first seen them until I see them on the right of way.

Q. You left them at the restaurant, and saw them again on the right of way when you picked them up?

A. No, sir. The hour and a half comprises the time I was around eating in the restaurant and resting. That takes in when I see them in there too.

Q. How much time elapsed from the time you left them at the restaurant until you picked them up on the right of way?

A. That all includes this hour and a half or two hours.

Q. But I want to know about how much time from the time you left them at the restaurant and didn't see them any more until you picked them up on the right of way.

A. I should judge half an hour.

Q. And during that time you didn't see them?

A. No, sir.

Q. You didn't see them take any drinks in the restaurant?

THE COURT: You mean in the restaurant, or before he left the restaurant?

MR. CORKERY: Any place about the restaurant.

A. I seen them take no drinks in the restaurant.

Q. So the first drinks you saw them take was when you picked them up on the right of way, isn't that true?

A. The whole bunch, yes, sir.

Q. You say Chamberlain may have taken two drinks, but that is about all?

A. No, sir. I said that I didn't know how many

he had taken. I said it was passed several times, and I didn't notice him refuse any.

Q. I thought you said on direct examination that you saw him take several, you couldn't say how many, isn't that right?

A. I don't believe I said that.

Q. All these drinks you saw him take was after you had picked them up, wasn't it?

A. No, sir. They was drinking coming down the right of way. I believe I stated that before.

Q. That is, when you picked them up, about that time, isn't it?

A. Yes.

Q. And you had already got your speeder then and was making arrangements to pull out?

A. And then went down and backed the car out and started out.

Q. Now then, sir, how much did these men pay you for hauling them?

A. They did not pay me anything.

MR. KORTE: That is immaterial.

MR. CORKERY: Q. Did they pay your partner anything?

MR. KORTE: He has answered the question no. He is bound by it, Your Honor.

MR. CORKERY: He said they didn't pay him.

WITNESS: I received no money.

Q. You had a partner, didn't you?

A. My boss, Mr. Ernster. I don't know whether he received any or not.

Q. He was with you at this time?

A. Yes, sir.

Q. What was his name?

A. Mr. Ernster.

Q. If he had received any money for carrying these men you would have known it?

THE COURT: What is the purpose of going into this?

MR. CORKERY: We want to show that these men made a practice of carrying passengers for hire, and it was not a proposition of picking up a drunk; it was simply a commercial proposition of carrying men for money. The attempt to show here the reason they were so kind was that they thought they were drunk, and as a matter of safety for the company, so that they wouldn't get hurt, that they would carry them. I want to show that that is not the fact.

MR. KORTE: It wouldn't be binding on the company, Your Honor.

THE COURT: No. It is going to the credibility of the testimony. I think i will let him answer, if that is your purpose.

MR. KORTE: Isn't it an irrelevant issue, Your Honor? Is it cross examination?

THE COURT: No, I don't think so, if it is to be brought out for the purpose suggested. He stated thtat this witness said he picked these men up as a matter of safety, because they were partly drunk. Counsel says he will show that it wasn't for that purpose at all, but that it was for the money.

(Question read.)

MR. KORTE: Of course that is argumentative.

THE COURT: Yes, that particular question. The objection is sustained.

MR. CORKERY: Q. Didn't you, as a matter of fact, receive fifty cents apiece from each man carried on that car, either you or your partner?

MR. KORTE: It is incompetent.

A. I did not receive fifty cents.

Q. Didn't Mr. Ernster receive fifty cents from each man, either you or he in your presence?

A. Not that I know of.

Q. Can't you say yes or no, whether you did or he did?

THE COURT: Did you receive any money at all from these men?

A. No, I didn't receive any.

MR. CORKERY: Q. Did Mr. Stiles, in your presence?

A. Not that I know of.

Q. Now you say you picked up these men about a quarter of a mile from the station at Marble Creek?

A. No, sir,—a quarter of a mile was the distance between the station and Pokono siding.

Q. And you picked them up at Pokono station?

A. No, sir.

Q. Where did you pick them up?

A. About a hundred and fifty yards west of the station at Marble Creek.

Q. That would be about a quarter of a mile, wouldn't it?

THE COURT: A hundred and fifty yards.

MR. CORKERY: It would be a good deal less than a quarter of a mile, wouldn't it, that is, where you picked them up? You took them on down to what place?

A. Herrick, Idaho.

Q. You say you stopped several times and unloaded them and took them on again?

A. The first stopping point was just around the curve a short distance from the west end of the Pokono siding.

Q. And you stopped there and let them off, and went on about some other business?

A. We stopped there for a matter of three or four minutes, and then went on around the curve to a set-off and stopped again.

Q. Did you at any time set the men off or let them get off and go about other work?

A. We set off for a train there.

Q. I am asking if you made another trip down to make some repairs and come on back and got them?

A. No, sir.

Q. So that they were with all the time?

A. On the trip down.

Q. So that on the trip of these men from Marble Creek to Herrick they were with you all the time?

A. We left them for I should judge five minutes.

Q. What did you do during those five minutes?

A. Went back and picked up a man by the name of Black Joe.

Q. Now, Mr. Chamberlain sat there on the speeder, you say, he sat on what part?

A. Right over the tool box and the tray.

Q. He sat there, did he, on the tool box?

A. On the back end of the tray, yes, sir.

Q. Sat there all the time?

A. No, sir.

Q. Well, he sat there all the time you were running the speeder?

A. Part of the trip he did, until we set off for the train; then he changed his position.

Q. Now you couldn't say, Mr. Witness, that Mr. Chamberlain was intoxicated there, could you?

A. To quite an extent, yes, sir.

Q. You wouldn't say that he was drunk, would you, here before this jury?

A. Yes, sir.

Q. Well, you say he was intoxicated to quite an extent? What do you mean by that?

A. Why, from his manner of speech and the way he walked.

Q. You observed all that when he got off of the platform at Herrick?

A. Yes, sir.

Q. You didn't pay any attention to him after he got off the platform at Herrick? He got off himself, didn't he?

A. No, sir. I don't remember exactly there, but as far as paying attention to him, it was only to see that he went over and sat down on these trunks or boxes.

Q. I say, he got off himself?

A. I don't know. One of the men on the car I think lifted his leg over the running gear there.

Q. You left him on the station platform?

A. Yes, sir.

Q. Alongside of a hole, unguarded?

MR. KORTE: That is not cross examination, Your Honor.

MR. CORKERY: They make the claim, if Your Honor please, that they were looking after this man as a matter of safety, to protect him. Now it is inconsistent that they would leave him in this unguarded place.

THE COURT: I don't think they make the claim that they were looking after the man to protect him.

MR. KORTE: No, that wasn't my claim, or anything of the kind. That they picked him up off the track as a matter of humanity, to get him away from there.

THE COURT: I don't think he stated that they were trying to get him off of the right of way.

MR. CORKERY: Q. Well, if you left this man on the platform, alongside of this unguarded hole, he wouldn't be in any safer place than where you picked him up, would he?

MR. KORTE: I object.

THE COURT: Sustained.

MR. CORKERY: An exception.

Q. Chamberlain, of course, went along up to Black Joe's place, didn't he?

A. No, sir.

Q. He didn't go up there?

A. He did not go down to Black Joe's place. Black Joe's place is down below.

Q. Where was he when you went down there?

A. Chamberlain and Wallace La Branch were together at this set-off point.

Q. Why did you leave the company's employ?

A. Why did I?

Q. Yes.

A. To join my father in business.

Q. You weren't discharged on account of accepting fare there, were you?

A. No, sir. I have credentials in my pocket. I could go back any time.

MR. CORKERY: That is all.

RE-DIRECT EXAMINATION by

MR. KORTE:

Q. What hour was it that you arrived at Herick and unloaded them there, if you recall it?

A. If I remember right, it must have been around 4:30 or 4:45, because we looked at our watches then and concluded that if we went at a good gait we could beat 17 in to headquarters.

Q. When you got them loaded on to the speeder how fast did you operate the speeder, from the time you loaded them on until you unloaded them at Herick

A. I should judge about five miles an hour.

MR. KORTE: That is all.

MR. CORKERY: That is all.

CHARLES F. ERNSTER, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. KORTE:

Q. State your name.

A. Charles F. Ernster.

Q. How old a man are you?

A. Twenty-three.

Q. Are you married or single?

A. Married.

Q. Where do you live?

A. Rockdale, Washington.

Q. At the present time?

A. Yes.

Q. At one time did you live at Marble Creek, Idaho?

A. Yes, temporarily.

Q. What period of time was it that you lived at Marble Creek, and when did you live there?

A. I don't remember the exact date I went there. I have got it marked down in a little diary, but I haven't got that with me.

Q. Give us your best recollection?

A. I was there two weeks, and when this trip happened I was there about one week, I guess.

Q. You were signal maintainer, were you not?

A. Yes, sir.

Q. The same as Mr. Hodges?

A. Mr. Hodges was helping me.

Q. You are working for the railroad at the present time?

A. Yes, sir.

Q. And have been ever since this accident?

A. Yes, sir.

Q. You remember the incident when Mr. Chamberlain was injured?

A. Yes, sir.

Q. Did you see him around Marble Creek that day?

A. Yes.

Q. What time of day was it when you first saw him?

A. It must have been somewhere around noon.

Q. Did you see him off and on from that time on in the afternoon?

A. I seen him about three times, I think.

Q. Who was he with?

A. He was with a few of them around there. He was up in the store when I see him once, and this man, Mr. Hodges,—this man Mr. Hodges referred to as Andy and Charlie—I forget his name now.

Q. McDowell?

A. McDowell.

Q. Did you know the La Branch boys?

A. I didn't know them only by sight. I didn't know their name at that time, but I learned afterwards that one of these boys was La Branch.

Q. Did you see such a man there with him at that time?

A. Yes, sir.

Q. Who else did you see him associated with at Marble Creek?

A. I couldn't say exactly. I know there were men around there.

Q. There were other men, were there, around there?

A. Yes, sir.

Q. Where you saw him around those other men at Marble Creek from 11 o'clock on, tell the jury whether or not you saw Chamberlain drinking whiskey and the other men drinking whiskey with him.

A. Yes, sir.

Q. Tell in your own way what you saw, so that we can get an idea of it, too, what it is to drink whiskey.

A. I seen Chamberlain take a drink as he passed my car on their way walking down the track west, he and this Andy, and Charlie McDowell was along, too, and Mickey, and Mr. Chamberlain were all together.

Q. And after that did you notice Chamberlain anywhere else? Did you see him after that anywhere else, after you saw him go past where you were?

A. No, I didn't see him until later on. We must have left there shortly after that.

Q. And where did you come upon them?

A. Just a short ways west of Marble Creek.

Q. Now tell the jury just how you came upon them there.

A. Well, they were all walking down the track, and they were all staggering, and they flagged us down and wanted to know if we would carry them down to Herrick, and I thought it best to do so on account of their drunken condition.

MR. CORKERY: We object to this.

THE COURT: Overruled.

MR. KORTE: Go ahead and tell in your own way.

A. On account of their drunken condition I thought it would be best to take them down there, that I was doing the right thing, because it is awful crooked track, and trains come down that hill awful quiet, and if they weren't on the alert they would probably get run over.

Q. What did you do then by way of giving them a ride down, and how did you load them on?

A. We told them where to get on, and they got on where we told them, except this La Branch boy, and he seemed to be the most intoxicated one of the bunch, so he laid in the tray.

Q. Where is that tray?

A. Say this is the top of the car, and here is the tray that I am sitting in, for instance, and he backed up this way, and leaned up against the legs of the other men, and had his feet sticking out over the top of the tray, so there was no possible chance for him to fall off.

Q. After you moved on, what, if any, drinking did Chamberlain do or any of the other men?

A. When we stopped to set off this fast freight train, after we seen Black Joe, we thought then to get down over the bank out of the way of the train, and they took several drinks then, several.

Q. Did you see Chamberlain drink?

A. Yes, sir.

Q. Go ahead.

A. And Chamberlain and Black Joe were behind a little hill there arguing.

Q. What were they saying?

A. That was afterwards that the argument came on. I am getting ahead of my tale here.

Q. Go ahead and tell just the circumstances there in connection with what you did and what they did.

A. After we had set off there we went back up and got Black Joe and hauled him down to the house,

and a couple of the boys took him over to the house, but he had made a cross-cut, with his gun.

Q. What was he trying to do with it?

A. He seemed to be gunning for somebody; as near as I could make out, it was Bart Chamberlain.

MR. CORKERY: We object to that. That is wholly voluntary.

THE COURT: You may state what he said and what he did, but not your conclusions.

MR. KORTE: Q. State what Black Joe said to Chamberlain and what Chamberlain said to him, whether they said anything or not, when he came up there with a gun.

A. Well, this Andy and Chamberlain went down the track to talk it over with him, and he was cursing and swearing at them, and Andy grabbed the gun, and he pulled the gun down, and was going to shoot, it looked like to me.

Q. Shoot who?

A. To shoot either Chamberlain or Andy, I don't know which; I couldn't see; so then was when the argument——

THE COURT: You say Andy caught hold of the gun?

A. Yes, sir, and fired four or five shots out of it, and then they commenced to argue among themselves.

MR. KORTE: Q. Tell what they said to each other, with reference to the kind of language they were using.

A. They were swearing and cursing at one

another, and Black Joe said he was going to kill him if he could get his gun back, but I had the gun then. I got down there as soon as I seen it was safe, and I had the gun myself.

Q. Did you quiet down the fracas?

A. The fracas quieted down.

MR. CORKERY: We object to that.

MR. KORTE: Q. What did you do after that?

A. We went on down——

THE COURT: Did you take them back on the car then?

A. Yes, sir; we loaded them all on there, including Black Joe.

MR. KORTE: Q. Where did you go then?

A. We proceeded to go on down to Herrick, and we left some of them there just at the curve east of Herrick.

Q. What did you do with the gun when you went on?

A. We left it up there in the bushes. I picked it up on the way back. We left some of them and took La Branch and this Mickey,—I don't know whether we took another man or not,—but anyhow we took them on down to Herrick, and then went back after the other bunch.

Q. Who was in this last bunch?

A. That is what I don't know; I don't know which half we took first.

Q. Was Chamberlain in either one of the bunches?

A. Yes.

Q. All right.

A. We did not unload them on that board walk. It was this side of that; it was east of that and west.

Q. Where did you unload Chamberlain?

A. We unloaded him on a kind of a little gravel fill there, very close to this board walk, but not right there on the walk; they would fall over, all they would do would be to roll down the bank in the clay.

Q. Describe his walk when you unloaded him.

A. It was very unsteady, just the same as any man under the influence of liquor would walk, if he had that much.

Q. Where did you go then, and what did you do?

A. We went on down a ways to the telephone booth, that is at—well, it is opposite the section foreman's house at Herrick; that is below the station I should judge about half a mile; and we figured then that we could get back up to Herrick ahead of No. 17, so we went on back.

MR. KORTE: You may take the witness.

CROSS EXAMINATION by

MR. CORKERY:

Q. You say you did make one trip down to Herrick with part of them and left the other part back there?

A. Yes, sir.

Q. And all the drinks that you ever saw Mr. Chamberlain take was one?

A. No, sir, I did not say. I seen him take enough to make any man pickled.

Q. Was you pickled?

A. I certainly was not.

Q. You didn't take any drinks?

A. No, sir.

Q. Not a one?

A. No, sir.

Q. Did your partner take any?

A. No, sir.

Q. Isn't it a fact that Mr. La Branch gave you from a dollar and a quarter to a dollar and a half for the passage of those men?

A. No, sir, not a cent.

Q. Didn't you make a practice of accepting money for the transfer of those men?

MR. KORTE: I object.

THE COURT: Just a moment, gentlemen.

MR. KORT: I object to that as immaterial and irrelevant, so long as it isn't confined to these particular ones, Your Honor.

THE COURT: Overruled. You will be bound by his answer though.

MR. CORKERY. Answer the question.

A. What is the question?

MR. CORKERY: We will withdraw the question, if Your Honor please.

Q. You say you unloaded him, or rather he got off at a place some distance ahead of the platform?

A. Yes, sir, right next to the platform, but not on the platform.

Q. And there was a path leading away there that he followed?

A. There was no path there. Of course there is a lot of trails around there, I think, but it is all down hill, steep embankment there.

Q. And he went on down the embankment, down the trail?

A. I don't know where he went. I was very glad to get away from him.

Q. Well, if this man was drunk, you certainly watched the way he went, didn't you?

A. What was it to me? He wanted to go to Herrick, and I figured he would be safe there because the people around him would take care of him.

Q. Answer the question, as to whether you watched in which direction he went.

THE COURT: No. Your question is put in an argumentative form, and the answer is simply responsive to it.

MR. CORKERY: Q. Did you watch in which direction he went?

A. No, I did not.

Q. So you can't say now whether he went on the platform or went home?

A. No, sir.

MR. CORKERY: That is all.

MR. KORTE: That is all, Mr. Ernster.

MRS. MARG. MARSTON, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. KORTE:

Q. State your full name to the jury.

A. Mrs. Marg. Marston.

Q. Where do you live?

A. Herrick, Idaho.

Q. How long have you lived there?

A. Three years.

Q. What is your business there, Mrs. Marston?

A. Cedar pole and post business, and also a hotel.

Q. You ran the little hotel there?

A. Yes, sir.

Q. Will you tell the jury how many buildings there were at Herrick, and what there is where you live?

A. There is my hotel, and Mr. and Mrs. La Branch's house; there is also a little house that belongs to Joe Doherty; and there is also a little tent that belongs to Mr. and Mrs. La Branch, and there was also an old saloon building. There is the old postoffice that used to be the old postoffice, and there is an old warehouse that the Milwaukee used to use. That is all.

Q. Do you remember when the station building was taken away from there?

A. I don't remember the date, no.

Q. But you recall that it was taken away?

A. Yes, sir.

Q. Was that before or after, if you know, the time when Mr. Chamberlain was injured?

A. It was taken away before.

Q. And after the station was taken from there, how did you travel with reference to the railway trains?

A. You mean how did—

Q. How would you get on the trains there when you wished to travel out of the little station?

A. Well, for a while after the station was taken away, it stopped, but for some time now and at the present time you have to flag it before you can get on.

Q. But it is what is called a flag station?

A. A flag station.

Q. You have known Bart Chamberlain, have you not, during the time you have lived there?

A. Yes, sir.

Q. Where did he live, Mrs. Marston, with reference to the station and the little town of Herrick?

A. He lives across the river, but I couldn't tell just where he does live, because I have never seen his house only just from my place, but he lives across the river, up kind of on the hill.

Q. I wondered whether or not you would be able to read this blue print that I want to identify as the station of Herrick, on the defendant's line. Are you able to note on there what there is in reference to the railway right of way and the river and your buildings?

A. There, that is Herrick.

Q. Are you able to tell from this map where the railroad is, and where the river is, and where your building is located?

A. Yes; here runs the river, and here the railroad; and there is where my house stands.

Q. Tell from Defendant's Exhibit No. 2 where your hotel was located with reference to the depot or the platform. Can you tell it on there, or mark it on there?

A. You mean what direction?

Q. Yes,—it is south or north?

A. My house stands south.

Q. Of what?

A. From the platform, at this time, directly south.

Q. Had you seen him around the station of Herk at various times, Mr. Chamberlain?

A. Yes.

Q. Prior to the time he was hurt?

A. I didn't see him that day.

Q. Before that had you frequently seen him about the station grounds?

A. Yes, sir, he is there most every day.

Q. Now do you recall the day when he was hurt?

A. Yes, sir.

Q. Do you recall when, as Mr. McDowell said, he was brought to your hotel?

A. Yes, sir.

Q. Do you recall that incident?

A. Yes, sir.

Q. Do you remember prior to the time and when it was daylight of seeing Bart Chamberlain walking along the track or near the depot?

A. You mean when they brought—

Q. The depot platform.

A. When they brought them down?

Q. Yes. Do you recall when the motor car brought the men down from Marble Creek?

A. Yes, I saw them bring Bart Chamberlain down on the motor car.

Q. Did you see Chamberlain when he got off?

A. Yes.

Q. In what direction was he going?

A. He was going west.

Q. Tell the jury now just how his walk was. Describe his walking, with reference to whether it was steady or unsteady.

A. Well, from where I lived, it wasn't very steady.

Q. You, in your lifetime, I presume, Mrs. Marston, have seen men under the influence of intoxicating liquors?

A. Yes, sir, quite a number of them.

Q. From your observation of him and seeing him as you did when he got off of the speeder and walked west, was he or was he not intoxicated?

A. Well, I wouldn't call him a sober man.

Q. Did you see him subsequently to the time that he walked west?

A. I never saw him—I saw him when they took him off the speeder, or when he got off the speeder, and then I noticed him walking down the track west from where they unloaded him.

Q. And after that you didn't see him until they brought him to the hotel?

A. I didn't pay any attention to him.

Q. Do you remember, some time after he came out of the hospital, of having a talk with him about his injury and his condition?

A. Yes, sir.

Q. Tell the jury when that was and what he said to you and what you told him, just tell it in your own way, how it occurred.

A. His partner, Jim Peters, came to my house and asked me if he could wait at my house for the train. The train was late that day, and he was going to the hospital. And I said, "Bart, how do you feel? Did you get hurt much?"

MR. CORKERY: What day was this?

MR. KORTE: This was some time after he came out of the hospital.

Q. Just tell the conversation.

A. I asked him, I said, "Bart, were you hurt much? How do you feel?" And he said, "Oh, well, that is what booze does," and we never said anything more about it. He waited there until time for the train, and then he went on down and took the train.

Q. Can you recall about the time when you had this talk?

A. No, I couldn't tell the date of it.

MR. KORTE: I think that is all.

WITNESS: It was a short time after he came out of the hospital the first time.

MR. KORTE: That is all.

CROSS EXAMINATION by

MR. CORKERY:

Q. You say he was walking west?

A. Yes, sir.

Q. And you were in your house, were you?

A. Yes, sir, I was in my house.

Q. About how far is that from the depot?

A. About four hundred and fifty feet.

Q. You were quite a ways away then?

A. Four hundred and fifty feet, just about; I

never measured it, but I imagine about four hundred and fifty feet.

Q. Inside of the house?

A. I was standing at the south window, dining room window.

Q. There has been considerable feeling and trouble between you and Mr. Chamberlain?

A. There is not.

Q. You had some trouble over a hay deal there?

A. We did. We didn't have any trouble over it, but he sold us some hay.

Q. You didn't speak for a long while after you had that transaction, did you?

A. Whenever I met him I spoke to him.

Q. When you had this transaction, you and the other gentleman interested with you, didn't speak, after this deal?

A. Whenever I meet Mr. Bart Chamberlain I always speak to him.

Q. Will you answer the question as to whether or not, after you had this deal, for any length of time, you and your husband didn't speak to him.

A. Yes, sir, we spoke to him when we saw him.

Q. You had trouble over the hay, didn't you?

A. No trouble, no.

Q. You didn't have any ill feeling over that?

A. No, sir.

Q. What was done about this hay deal that you had?

A. Bart Chamberlain sold the hay to Mr. Mars-ton and I, and we was to pay him the money at times

until the hay was brought over across the river, and we tried to get a baler, and we couldn't get the baler to bale the hay, and so we left it there, and we couldn't get it across the river, and in the meantime there was a gentleman by the name of Dick Talbot brought in a bunch of horses, and Bart Chamberlain came over and asked Mr. Marston if he would turn the hay over to him, and this Dick Talbot was to pay him so much a month to look after the horses, and they did so, and they turned the hay over to Dick Talbot, and Dick Talbot went and turned, turned the money over to Olson & Company, which I owed them \$55, and Bart Chamberlain nine dollars and something, I think,—I am not sure—I believe it was nine something.

Q. That was what the difficulty was about?

A. That was all the difficulty was about.

Q. Have you just been married recently?

A. Yes, sir.

Q. And the gentleman you are married to was in business with you up there prior—

A. Yes, sir.

Q. Living at this hotel?

A. Living at my hotel.

Q. And you and he made a statement, didn't you, that you was going to fix Mr. Chamberlain?

A. No, sir, we did not.

Q. I will ask you if since this trial, and while you have been waiting, you haven't been closely watched by the gentleman sitting here, a claim agent for the company?

A. No, sir.

MR. KORTE: That is not cross examination, Your Honor, and such insinuation I don't think should be permitted.

THE COURT: No. I shall have to reprimand you, Mr. Corkery, for making a suggestion of that kind. It is wholly improper.

MR. CORKERY: We would like to show the fact. We can show the constant association of the party interested for the defendant and this witness here.

THE COURT: You may ask whether she is associated with him.

MR. CORKERY: Q. Isn't it a fact that you were constantly associated with the claim agent of the company during the past several days, waiting for the trial?

A. We have come over on the car together, gone over on the car together and come back together.

Q. Gone to Spokane together?

A. Yes, sir, we went into Spokane together.

MR. CORKERY: That is all.

RE-DIRECT EXAMINATION by

MR. KORTE:

Q. You have associated with me, too, haven't you, Mrs. Marston?

A. Yes, sir.

MR. KORTE: That is all. Call Edwin Greenwood.

EDWIN B. GREENWOOD, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. KORTE:

Q. State your full name to the jury.

A. Edwin B. Greenwood.

Q. How old a boy are you?

A. Fifteen.

Q. Where were you born?

A. In Michigan.

Q. Where were you living when you came west first?

A. I don't know what you mean by that? When we come here?

Q. Yes.

A. We was living in Saskatchewan when we come here.

Q. And how long did you live in Saskatchewan?

A. One year.

Q. What was your father doing there?

A. Farming.

Q. Are there mines around that territory?

A. No, sir.

Q. Did you at one time live in a mining country?

A. Yes, sir.

Q. Where was that?

A. Tabor, Alberta.

Q. What was your father doing there?

Q. And you lived there among the miners, did contracting.

Q. And you lived there among the mines, did you?

A. Yes, sir.

Q. And during the time you lived there, Edwin, had you ever seen a man drunk?

A. Yes, sir, I have seen plenty of them every Saturday night.

Q. When did you come down to the Marble Creek country, Edwin?

A. Last year.

Q. What is your father doing there?

A. He is making posts for Joe Marston.

Q. That is the husband of Mrs. Marston?

A. Yes.

Q. Where do you live?

A. We live at Herrick, Idaho.

Q. Right near where Mrs. Marston lives?

A. Yes.

Q. Do you know the La Branch boys?

A. I know them apart now; I didn't last year.

Q. Did you know Bart Chamberlain? ?

A. Yes, sir.

Q. How long have you known him?

A. About a year.

Q. Where did he live with reference to the little station of Herrick, where you live?

A. Straight across the river about half a mile.

Q. How did he get back and forth across the river?

A. In a boat.

Q. How would he operate the boat?

A. You have to take a pike pole.

Q. That is, take a pike pole and pole your boat across the river?

A. Yes.

Q. On account of what,—swift water?

A. Swift water.

Q. Have you seen him poling back and forth since he was hurt?

A. Not from that place, but I have seen him pole the swifter rapids below that place.

Q. Swifter rapids?

A. Yes, sir, directly across from the bridge.

Q. When you speak of the rapids tell the jury what it was.

A. Swift water, running over the rocks.

Q. Do you remember the day when he was hurt?

A. Yes, sir.

Q. When did you first see him on the platform, if you saw him at all, Edwin?

A. I was up with my lantern, when I see him on the platform, and it was quite dark.

Q. How did you come to go down to the platform that evening?

A. The La Branchs had my lantern, and they had been around there, presumably at least.

MR. CORKERY: We object to that and move to strike it out.

THE COURT: Yes.

A. And my mother said, "You had better go down and get that lantern. Them boys is drinking—"

Q. You needn't state what your mother said.

THE COURT: Your mother said to go down and get the lantern?

A. Yes, sir.

MR. KORTE: Q. And you went down to the platform?

A. Yes, sir.

Q. Was it dark when you went down there?

A. Yes, sir.

Q. Where did you see Bart Chamberlain first?

A. I didn't see him at first. I went to the further end of the platform, and there was a considerable time I was there before the train come.

Q. When did you first notice him, and where was he?

A. He was sitting on the trunk when I first noticed him, having words with Frank La Branch.

Q. How near did you go to him then when you heard these words?

A. I didn't come very much nearer. I was thirty feet from him.

Q. Go ahead and tell what happened there when you came up to where he and La Branch were having the words.

A. I come up to within maybe ten feet of him, and the train was coming about half way between the tunnel—

Q. How far is the tunnel from the platform?

A. It is about, I should say, three-quarters of a mile, a little over three-quarters of a mile. The train was coming near, and I expected my father from Marble Creek on the train, and so I picked up and come down, and I was about ten feet maybe from the trunk, and I turned around, but the headlight

had not yet struck the trunk, and I seen Mr. Chamberlain get up, and I would say that he was under the influence of liquor.

Q. How did he act? Just tell the jury, when he got up, just describe how he got up.

A. He was sitting on the trunk, with his back east, facing west.

Q. Which way would that be with reference to where he fell off?

A. It was like if he was sitting on the trunk here, with his back to the headlight, he went cater-cornered and fell off.

Q. How did he act when he got up, with reference to movement?

A. Well, he seemed to be, well, just shaking a little, trembling, like, and he moved sort of side ways, and I seen Mr. Frank La Branch put out his hand. I don't know whether—it was too dark for me to say whether he touched him or hit him, or didn't touch him at all,—and I seen Mr. Chamberlain raise his hands, and then he fell over.

Q. What did you do?

A. I just stopped and looked, and Frank went around with the lantern and he went down there, and then Mrs. La Branch, and he hollered for Mrs. La Branch, and she took the lantern, and I followed.

Q. What did she say?

A. I was scared half to death. I thought Mr. Chamberlain was dead; his face was dirt and grime on it.

Q. What remark did Mrs. La Branch make, if any at all?

A. She said, "He is dead," and Mr. La Branch looked at him, and he said he wasn't dead, and the train was then coming around the curve, and the headlight was on the platform, and he told her, "You had better get back up and get the kids, and I will watch him."

THE COURT: Who said that?

A. Mr. La Branch.

MR. KORTE: Q. What did you do then?

A. I didn't do anything. I was scared to death.

Q. Do you remember, after Bart came out of the hospital, and some time about when this suit was brought, if you know it, an instance of having a talk with him about this case?

A. Yes.

Q. Tell the jury about how you come to have the talk with him, and what he said to you.

A. I was up on the platform one morning to buy a paper, and I don't remember just what time it was; I don't remember whether it was spring or winter, but Mr. Chamberlain was standing on the platform there with me, and I asked him how bad he was hurt, and whether there was any pain or not, and he said, yes, he was, and I told him I had seen, the night before I had seen about the court in the papers, that he had sued the company, in the papers, and that he was suing the company, like that. "Yes," he says, "suing the company, and they are likely to call you as a wit-

ness, and he says, "If you will keep quiet," he says, "I will give you a piece of money out of it."

MR. KORTE: You may take the witness.

CROSS EXAMINATION by

MR. CORKERY:

Q. How many persons have you talked with about this case, other than your own folks,—how many strangers?

A. I don't know.

Q. Sir?

A. I haven't talked with any, not to amount to anything.

Q. Well, whether they amount to anything or not, just tell us the names of those you have talked to.

A. Mrs. Marston for one.

Q. Did you talk over with reference to what your testimony would be in this case?

A. Mrs. Marston was there when I gave my testimony to the company shortly after it happened.

Q. Whereabouts was it that you gave your testimony to the company?

A. Right at Mrs. Marston's house.

Q. Who was present then?

A. Mrs. Marston.

Q. Who else?

A. That is all I can remember.

Q. What do you mean by giving your testimony to the company? Do you mean some representative of the company?

A. Just what I—

THE COURT: Who represented the company?

A. Mr. McKay, the claim agent.

Q. This gentleman here?

A. Yes.

Q. For a short time after the accident occurred, in talking with people, you gave the same answer to them all, namely, that he was pushed off by this other gentleman?

A. I did not. I said I didn't know whether he was pushed off or not.

Q. And you don't know now whether he was pushed off or fell off?

A. I do not. It was too dark.

Q. How far away were you from Mr. Chamberlain at first? When was it you were thirty feet away?

A. First I was at the end of the platform, presumably maybe about thirty feet away. When the train began to come near, I drew back towards Mr. Chamberlain sitting on the trunk.

Q. So that before the train came in, and when things were fairly quiet, so far as any noise or anything like that from the train was concerned, then you were thirty feet away from Mr. Chamberlain?

A. Yes.

Q. And the night was dark there?

A. Yes, sir, dark except for the lantern sitting on the trunk.

Q. When the train came in, and during the time the train was heading in there, and the light was on, and the noise of the train, were you any nearer than ten feet or about ten feet?

A. Well, I should say I was under ten feet.

Q. You want to change your testimony now, do you, and say you were under ten feet?

A. I would say that I was ten feet or under.

Q. In your talk there, in giving your testimony to the company, as you have stated, to the claim agent, in the present of Mrs. Marston, did you talk over that feature too, as to whether it was ten feet or under ten feet?

A. No, sir.

Q. That wasn't brought up?

A. No, sir.

Q. Did they ask you how near you were?

A. Yes, sir.

Q. What did you say?

A. I told them I was about ten feet.

Q. So you couldn't tell just what the condition of the man's hands was, whether he was shaking hands or what he was doing?

A. No. If he was shaking hands Mr. Chamberlain didn't put up his hands to shake with him.

Q. Well, you couldn't see it at that distance?

A. Yes. Mr. Chamberlain's hands was in the light.

Q. That was when he fell over backwards?

A. Yes, sir.

Q. So that the time his hands was in the air was when he fell off the platform?

A. Yes.

Q. You wouldn't state positively whether he shook hands with him before that or not?

A. He might have shook hands before that, because I didn't notice him when I first come on the platform.

MR. CORKERY: That is all.

RE-DIRECT EXAMINATION by

MR. KORTE:

Q. When you noticed Bart there on the trunk were you able to tell whether he was drunk or not, according to the way you have seen these fellows up in Alberta?

A. No, sir. He wasn't moving.

MR. KORTE: That is all.

RE-CROSS EXAMINATION by

MR. CORKERY:

Q. Shortly after this accident occurred did you have a talk with Mr. Glover about that place?

A. I don't know.

Q. Would you say positively that you didn't?

A. No, I can't say positively that I didn't.

Q. I will refresh your recollection. Didn't you, after this accident a short time, a few days, have a talk with Mr. Glover, in which talk you stated—

THE COURT: Where?

MR. CORKERY: At that store building in Her-
rick,—have a talk with Mr. Glover, in which you said that at the time the accident occurred you were up near the house?

A. No, I didn't.

MR. AILSHIE: Who was present?

MR. CORKERY: He and Mr Glover were present. You didn't have any such talk as that at all?

A. No, sir.

Q. You are positive about that?

A. Yes, sir.

Q. Are you also positive that you didn't have any talk about the accident?

MR. KORTE: That is not an impeaching question, Your Honor.

MR. CORKERY: I may not have gotten the exact talk between you, so I will put it again.

Q. First I will ask you if you had any talk with Mr. Glover?

A. I can't say whether I had any talk with Mr. Glover or not.

Q. I will ask you if you had a talk with him in which you said that you were between the store and the station there at the time the accident happened?

A. No, sir; I know I didn't have no talk like that, because I was on the station platform.

Q. How would you be positive you didn't have any talk?

A. Because I wouldn't say anything like that, that wasn't true.

MR. CORKERY: That is all.

MR. KORTE: I would like to have the boy excused.

MR. CORKERY: We have no objection.

MR. KORTE: That is all, Edwin. You may go home.

HENRY H. McCARTHY, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. KORTE:

Q. Your full name?

A. Henry H. McCarthy.

Q. You are the local surgeon of the Chicago, Milwaukee & St. Paul, at Spokane?

A. Yes, sir.

Q. You examined the plaintiff, Bart Chamberlain, today at noon, did you?

A. Yes, sir.

Q. Tell the jury his physical condition on that examination, as you found him today.

A. Well, I made an examination of Mr. Chamberlain in the presence of Dr. Platt, at his room in the hotel here, and I stripped him and examined him, his general physical condition. His eyes, and his chest, and his heart, and lungs, and abdomen, and his nervous system, reflexes, his joints, all except the urinary examination; I didn't examine the kidneys, which Dr. Platt tells me are normal. For a man of his years he is remarkably well preserved. I could find no evidence of any present injury to him. Dr. Platt tells me he had a dislocation of his right shoulder. If he had, the present movements are normal. He can move his shoulder; he took off his shirt and lifted his arms up, his clothing, himself, and he did it unconsciously, before I drew his attention to the fact that he had complained of some trouble with his shoulder. There is no crepitation. There is no evidence of any present injury to it. If he did have a dislocation he is entirely recovered from it at this time.

Q. How did you find his lungs, Doctor?

A. In regard to his chest, his lungs, his expansion, or deep breathing, he has got good expansion, three and a half inches, for a man of his years, which is remarkable; and when he takes a long breath the extent to which the lung descends down is an inch and a half on each side. I marked it out with an indelible pencil on the the body, and they are both equal, on the right and left side. I understand he had pneumonia of the right lower lobe. If he had, he is completely recovered. There is no evidence of any adhesion and no crepitation, nothing at the present time that I can discover, and his heart is excellent, his arteries are good; they are as good as in a man of forty. His reflexes are good, and I see no reason why the man isn't in very good, perfect condition for a man of his age. He is much better than most men are at fifty.

MR. KORTE: Take the witness.

CROSS EXAMINATION by

MR. CORKERY:

Q. For a man of his age then you say he is in perfect condition?

A. For a man of his age he is excellent.

Q. There is no evidence, absolutely no evidence of this injury?

A. Not that I can discover.

Q. You heard Dr. Platt describe the adhesions there, did you, state that there were adhesions there now?

A. Well, I heard Dr. Platt say, but I tried to dem-

onstrate it with Dr. Platt today, and I can demonstrate it on him now if you will permit me to.

Q. You don't agree with Dr. Platt in his statement?

A. No, I don't.

Q. How long did you take in this examination?

A. About an hour.

Q. With this man down here?

A. Yes.

Q. What time did you get through that, Doctor?

A. I think we got through at twenty minutes to 1.

Q. With the patient?

A. Yes.

Q. How many times did you see him?

A. Just once.

Q. And you left his hotel at twenty minutes to 1?

A. Yes.

Q. And what time did you start in?

A. Started in just as soon as we got through here.

Q. And we left here a little after 12, did we?

A. Just about 12.

Q. During those few minutes was the only time you ever saw that man in your life?

A. Yes.

Q. And you never treated him?

A. No.

Q. And this judgment is derived from those few minutes you examined him?

A. Yes.

MR. CORKERY: That is all.

RE-DIRECT EXAMINATION by
MR. KORTE:

Q. Did you have sufficient time to make the examination?

A. Yes, sir.

Q. Would it require a longer time to make an examination so that you could tell whether there was anything wrong with the man or not?

A. No.

MR. KORTE: That is all.

MR. CORKERY: That is all.

MR. KORTE: Mr. Kirkpatrick?

WILLIAM KIRKPATRICK, produced as a witness on behalf of defendant, being first duly sworn, testified as follows:

DIRECT EXAMINATION by
MR. KORTE:

Q. Give your full name to the jury.

A. William Kirkpatrick.

Q. You are the agent of the Milwaukee at Marble Creek, are you not?

A. Yes, sir, I am regular agent there.

Q. And you were the agent at that point on November 15, 1916, were you?

A. I was.

Q. Have you the record with you that you made at the time that No. 17, the passenger train going west, departed from your station?

A. I have.

Q. Will you produce it, please?

A. Yes, sir.

Q. When was the items that are on this piece of paper, Defendant's Exhibit 3, put down by you?

A. As regards to train 17, immediately after their departure, I would say within five minutes, usually within one minute.

Q. That is a daily record that you keep of the arrival and departure of trains?

A. All trains when I am on duty.

Q. I wish you would read from that record when No. 17 arrived and departed at that station.

MR. CORKERY: We object. We don't see that there is any issue—

MR. KORTE: Yes. They claim that 17 didn't get in there until 7 or 8 o'clock, and it got in a little after 5.

MR. CORKERY: There is no question that it was after dark.

MR. KORTE: But Bart Chamberlain claims that he went down and went across to his home.

THE COURT: Overruled.

A. I can show that No. 17 arrived at 5:04 and departed at 5:05.

Q. How far is the station of Herrick from Marble Creek?

A. According to time card distances, it is four and nine-tenths miles.

Q. In your experience as a station agent, about what time would No. 17 arrive at Herrick, under the schedule it was running?

A. About 5:18 to 5:20.

MR. KORTE: Defendant offers in evidence Ex-

hibit No. 2, being plat of survey of road and station at Herrick. And the defendant at this time will offer in evidence Exhibit No. 3, being the daily record showing the arrival and departure of trains at Marble Creek.

MR. CORKERY: We object to it as not showing any arrival of trains at the station where the accident occurred.

THE COURT: I think I will let it stand as it is. The witness has testified from this.

MR. KORTE: The presumption is that it arrived on schedule time.

Q. Mr. Kirkpatrick, did you make a measurement, for the benefit of this trial, of the length and width of the platform at Herrick?

A. I did.

Q. What is the length of it? If you have the figures with you, just read them off.

A. According to my measurements, the length is about 92 feet, four inches.

Q. And the width?

A. The width varies from ten feet five inches to ten feet eight inches.

Q. Did you measure the distances at various points from the top of the platform on the rear to the ground?

A. I did.

Q. Give those measurements.

A. At the extreme west end it is four feet three inches, the vertical measurement from the edge of the platform to the surface of the ground. Fifteen feet

east of the west end it is five feet nine inches. Thirty feet east of the west end it was eleven feet four inches. Forty-five feet east of the west end it was the same, eleven four. Sixty feet east of the west end it was eight feet eight inches. Seventy-five feet east of the west end it was seven feet nine inches. And at the extreme east end it was five feet eleven inches.

Q. You were agent at Herrick before going to Marble Creek, were you not?

A. I was.

Q. Up to the time that the building was taken away?

A. Yes, sir.

Q. And you know the physical conditions there on that account?

A. Yes, I do.

Q. When was the station removed, the station building removed?

A. It was moved from Herrick on October 5.

Q. And after that what if any station was maintained there by way of a regular station?

A. There was no station,—just the platform was all that was left.

Q. No agent there of any kind?

A. No agent, no representative of the company at that point at all.

MR. KORTE: That is all.

CROSS EXAMINATION by

MR. CORKERY:

Q. But they still continued to take on passengers and discharge passengers after they removed the depot?

A. Yes, sir.

Q. And sold tickets to that point?

A. We did, yes, sir.

Q. There is a sort of a slant to a deeper place away from the bottom of that platform, isn't there?

A. There is, yes, sir.

Q. How much deeper would that make the distance that you measured, to the exact bottom of the hole?

A. It would be, I should say, at a point four or five feet north of a vertical line from the edge of the platform to the earth, would be about two feet or two feet four inches lower than immediately beneath the edge of the platform.

Q. So that the point you measured it to be eleven and a half, or whatever it was, it would be thirteen and a half clear to the bottom?

A. It would vary from eleven feet eight to probably thirteen feet, within a distance of four or five feet from the edge.

Q. You don't know, of course, anything about the time that this train arrived at Herrick, Idaho?

A. I do not.

MR. CORKERY: That is all.

RE-DIRECT EXAMINATION by

MR. KORTE:

Q. Had you had any report of any delay anywhere?

A. I had not.

MR. CORKERY: We object to that.

THE COURT: Sustained.

Q. Do you know when it arrived at St. Joe?

A. No, sir.

Q. You have no record of it?

A. No.

MR. KORTE: We will have to get the train sheet on that. That is all. I would like to have the exhibits I offered in evidence identified.

The defendant rests.

MR. CORKERY: Mr. Chamberlain may take the stand.

BARTHOLOMEW CHAMBERLAIN, heretofore duly sworn in his own behalf, upon being recalled in rebuttal, testified as follows:

DIRECT EXAMINATION by

MR. CORKERY:

Q. Mr. Chamberlain, I will ask you if any money was paid to the boys on the speeder, or either of them, that testified here, on account of the passage of yourself or the other men from Marble Creek to Herrick?

MR. KORTE: That is objected to as not rebuttal. And they were bound by the statement of the witnesses when they said that nothing was given to them, and it raises a collateral issue, Your Honor, which we are not prepared to meet. It is on an immaterial issue.

THE COURT: No. I stated that they would be bound by the witness' statement merely as to the general custom, but as to what occurred at this particular time I think they may rebut that.

MR. KORTE: Your Honor, they have injected in here an issue on cross examination as to whether or

not there was money paid by the men, or by these men, to the men operating the speeder, for the purpose of impeaching those men. Now if that is so, you cannot impeach upon a collateral issue or an immaterial issue, either one. Isn't it one or the other? If you may impeach on it, why may I not then come in and show still on top of that that there was no money paid, by other witnesses. It was brought out on their cross examination.

THE COURT: This isn't for impeachment merely in the sense of contradicting the witness' statement. Suppose they hadn't asked the question at all of your witnesses, they might still introduce this testimony, for the purpose of tending to overthrow your theory that these men were picked up because they were drunk or intoxicated.

MR. KORTE: I don't see the materiality of it. They have attempted to prove that the man was sober. I have proved that he was drunk.

THE COURT: They weren't bound to prove that he was sober. There was some evidence introduced to that effect. I suppose because you had stated in your opening statement to the jury that you would show that. They anticipated that. They weren't bound to. Suppose they hadn't put on any testimony at all to that effect, and you had put on testimony to show that the plaintiff was intoxicated at the time, then they could put on the testimony that they have put on upon that subject, and also show anything else that would be germane to that issue.

MR. KORTE: Would it tend to show that the man

was intoxicated, whether he paid money or not? It neither contradicts anyone, nor does it impeach. It can't in any manner affect the issue. The reason I stated in my opening statement to the jury that we picked them up through a humanitarian reason the men had, rather than let them lay there and be killed, that was an immaterial side of why they picked them up. The fact that they paid them money wouldn't prove whether they were drunk.

THE COURT: It is a matter of argument, gentlemen. I think it is a circumstance upon which you may base an argument. The objection is overruled. (Question read.)

A. Yes, sir,—when we got on to the car—

THE COURT: You have answered the question.

MR. CORKERY: Q. Just answer whether any money was paid, and, if so, how much, and who to?

MR. KORTE: That is immaterial, Your Honor.

A. I paid him a half dollar myself, and I see Mr. Le Branch pass him money three or four different times before we got to where we met Black Joe.

Q. You heard Mrs. Marston testify that she had a talk with you after you came out of the hospital, in which you said to her that your accident was on account of booze,—did you hear her say that?

A. Yes.

Q. I will ask you whether you ever did have any such talk with her?

A. I say no, because I wasn't drunk, and this is made up.

Q. I will ask you if you had any talk with the boy

who testified here, this small boy twelve years old, or whatever his age is,—you heard him testify that he had a talk with you after you came out of the hospital, in which you told him that if he would keep quiet you would give him a piece of money,—did you have any such talk as that with him?

A. No. I never would have dreamed of such a thing.

Q. Did you ever have any trouble with Mrs. Marston on account of the hay—

MR. KORTE: That is not rebuttal, Your Honor. It is raising a collateral issue about trouble.

THE COURT: Sustained.

MR. CORKERY: Q. After this hay deal of which she testified, I will ask you whether or not you were on speaking terms with Mrs. Marston?

MR. KORTE: The same objection, Your Honor. They were bound by Mrs. Marston's statement as to whether or not she had any ill feeling against the man, and she said not, and they are bound by that statement. They are bound by the witness' statement, and can't raise that collateral issue.

MR. CORKERY: I have a right to go in and show the bias of a witness on cross examination.

THE COURT: I doubt whether this question reaches the point. I shall sustain the objection to this question.

MR. CORKERY: An exception. That is all.

CROSS EXAMINATION by

MR. KORTE:

Q. You knew, when you were giving those boys

money, that they had no right to take it, didn't you?

A. I didn't know they had no right to take it.

Q. You knew they weren't running a passenger train?

A. I didn't know it.

Q. You knew they were running a motor car?

A. I knew they were running a motor car.

Q. You knew you were doing wrong when you paid them fifty cents?

A. I didn't know I was doing wrong.

Q. You knew they had no right to collect fare on the speeder, didn't you?

A. I gave them fifty cents. That is more than they charge on the train, isn't it?

MR. KORTE: That is all.

MR. CORKERY: That is all. Mr. Boutellier.

ADOLPH BOUTELLIER, produced as a witness on behalf of plaintiff, in rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. CORKERY:

Q. Your name is what?

A. Adolph Boutellier.

Q. And you reside where?

A. Worley, Idaho.

Q. What business are you engaged in?

A. Farming.

Q. What official position, if any, do you occupy at that place?

A. I am justice of the peace.

Q. Are you acquainted with Bart Chamberlain, the plaintiff here?

A. Yes, sir.

Q. How long have you been acquainted with him.

A. Since 1888 or 1889.

Q. And since that time, 1889, have you known him continuously?

A. Yes, sir.

Q. What would you say Mr. Chamberlain's reputation is in the community in which he resides for sobriety or the lack of sobriety?

MR. KORTE: That is objected to as immaterial and irrelevant, and not in rebuttal of any issue.

THE COURT: Sustained.

MR. CORKERY: That is all. I will call Mr. Glover.

JOHN H. GLOVER, produced as a witness in behalf of plaintiff, in rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION by

MR. CORKERY:

Q. Your name is what?

A. John H. Glover.

Q. Where do you reside, Mr. Glover?

A. Marble Creek, Idaho.

Q. Are you acquainted with Mr. Chamberlain?

A. Yes, sir.

Q. Did you see Mr. Chamberlain about the day he got hurt, the fifteenth of November, last year? Did you see him on that day?

A. Yes, sir, I saw him in the afternoon.

Q. Whereabouts?

A. He came up to Marble Creek.

Q. What business were you engaged in there?

A. I was running the ferry there.

Q. From where to where?

A. From—across the river there.

Q. Running the ferry across the St. Joe River?

A. Yes, sir.

Q. Did Mr. Chamberlain see you upon that day?

A. Yes, sir.

Q. For what length of time?

A. Oh, a few minutes. I don't know just how long.

Q. What was his condition as to being sober or otherwise at that time?

A. Sober.

MR. KORTE: That is not rebuttal. I think they went into this condition on direct examination.

THE COURT: It is very unusual to take this course. You put on considerable evidence as to his condition in your direct testimony.

MR. CORKERY: Well, if Your Honor please, that is, of course, a matter of defense, contributory negligence, and his condition, and we didn't ask the plaintiff his condition until they brought it out on cross examination, and that is their defense, which we have a right to rebut. We don't have to defend a question of contributory negligence.

THE COURT: That is very true, if you hadn't gone into it I think I shall let you go ahead, but you may have another chance to put on other evidence, if you desire to. You not only asked the plaintiff, but you asked two or three other witnesses.

MR. CORKERY: We did that after they had brought it out upon their cross examination.

MR. KORTE: No. You introduced La Branch. It would be part of the main case, Your Honor, anyway.

THE COURT: I shall let you ask this question.

MR. CORKERY: Q. What was his condition as to being sober or not?

A. He was sober.

Q. I will ask you, Mr. Glover, if you had a talk with this boy some days after the accident, at the store, in which he stated to you that he was up at the store some distance away from the accident, and didn't see it?

THE COURT: Answer yes or no.

A. Yes, sir.

MR. CORKERY: That is all.

CROSS EXAMINATION by

MR. KORTE:

Q. Mr. Glover, Bart had some whiskey in him that day when you saw him?

A. Not that I know of.

Q. How many drinks did you see him take?

A. None at all.

Q. Then you weren't around where he was all the time, were you?

A. No, sir.

(Witness excused.)

Testimony closed.

DEFENDANT'S MOTION FOR INSTRUCTED
VERDICT.

MR. KORTE:

The Defendant at this time moves the Court to direct the jury to return a verdict for the defendant upon the following grounds:

1.

The evidence shows that the proximate cause of the accident was not the absence of the railing on the platform, but the light from the locomotive blinding the plaintiff, whereby he stumbled over some boxes or trunks that were on the platform, and caused him to be thrown from the platform.

2.

The evidence is beyond dispute that the plaintiff knew, as well as the defendant, the physical condition of the platform, was aware thereof at all times, and on account thereof assumed whatever risk there was because of the absence of a railing on the platform, or he was guilty of contributory negligence as a matter of law, under the conditions as he described them, he having full knowledge thereof.

3.

The evidence shows that the plaintiff was not in a fit condition to be accepted as a passenger, and had he tendered himself to the conductor the conductor would have had the right to reject him.

THE COURT:

The motion of the defendant for an instructed ver-

dict is denied and the defendant is allowed an exception.

Whereupon the testimony being closed Mr. Corkery addressed the jury on behalf of the plaintiff, and thereafter Mr. Korte addressed the jury on behalf of the defendant, and the final argument was made by Mr. Corkery on behalf of the plaintiff.

Whereupon the Court instructed the jury as follows:

THE COURT:

"Gentlemen of the jury, I hardly need say to you that when you go to your jury room and come to consider your verdict, you will lay aside all suggestions which merely appeal to your feelings of prejudice and pass on, or your emotions, regardless of from which side they may have come, in this case. Sometimes incidents inadvertently come into the trial of a case which really have no bearing upon it, and unless we are careful our judgment may be somewhat disturbed thereby. There have been some intimations, and perhaps insinuations, in this case, possibly from both sides, as to certain conditions, which the evidence would not warrant you in finding to exist. So that when you come to the real consideration of what your verdict should be you should be careful to confine that consideration to the evidence, all of the circumstances in evidence, and only the fair and legitimate inferences which may be drawn therefrom. After all, there is no reason for passion in the trial of this case. It is a plain issue. It is a question as to whether or not the defendant company was

negligent, and as to whether that negligence contributed to the plaintiff's injury; and, upon the other hand, the question whether or not he himself was in such a condition at the time, and conducted himself in such a way that he could not complain of the defendant's negligence, even though you should find that in some respects it was wanting in due care.

"As you have been advised, it is a case where one who claims to have been a passenger or intending passenger, which would be practically the same, brings suit against a common carrier, alleging that he, the passenger, was injured by reason of the failure of the carrier to discharge its obligations as such common carrier. Now, as I look at it, the first question for you to consider is whether or not there was a station at the point in question, in other words, whether it was such a place as the railroad company provided for the reception and discharge of passengers. Did it recognize this point as a place where a passenger could lawfully and properly seek entrance to its trains, and where a passenger who had already taken passage upon its trains could ask to be discharged. It isn't essential to constitute a railroad station that there be a depot, as it is sometimes called, or a station building. If the company designates a place as one where it will receive and discharge passengers, that becomes in the eyes of the law a station, a place where the public may seek entrance to the trains and also may demand to be discharged therefrom, under such reasonable rules and regulations as the railroad company may establish to govern the

conduct of its business at such point. Now if you find from the evidence that the company did designate this as a place, recognize it as a place, where it would receive and discharge passengers, it was bound to keep it in a reasonably safe condition, under instructions which I shall give you in more detail later on.

“The next question for you to determine is as to whether or not the plaintiff himself was, at the time of the injury, and just prior thereto, at this point, for the purpose, in good faith, of seeking passage upon the defendant company’s train. In other words, did he come there, and was he there, for the purpose of becoming a passenger or taking the train, as we put it. You will readily recognize the fact that the railroad company owes no duty to one who merely trespasses upon its right of way or upon its trains or depot grounds or platforms. People have no right to go upon a railroad platform or into a railroad depot merely for the purpose of visiting or loitering or sleeping or resting, or for any other purpose except to transact business with the railroad company. That is the purpose of a depot, and that is the purpose of a platform about a depot. So that unless you find that the plaintiff was there at the time in question for the purpose of seeking passage upon the defendant company’s trains you need go no further, because he could not recover. If he fell off the platform, that was a chance he took in going there for his own pleasure or convenience. If, upon the other hand, you find that he was there with the in-

tention of becoming a passenger, the next question in logical order is whether he was there in such condition as would justify him in demanding passage upon the train, and that involves the question whether or not he was drunk. The general rule is that a railroad company must receive all people who offer themselves for passage. That is subject to a good many exceptions. People who offer themselves to be carried upon railroad trains must comply with reasonable rules and regulations of the company; they must either pay the fare or be ready to pay it, the regular tariff rates, and in addition to that they must be in such condition as not to imperil their own lives or safety by becoming passengers, and they must also be in such condition as not to unduly disturb the peace of other passengers or endanger the lives or persons of other passengers. So it is that ordinarily an insane person cannot demand to be carried upon a passenger train. You can see why that would be, because such insane person might injure you, if you were a passenger, or injure some other person. So a man who is drunk may be refused passage for the same reason, for a drunken man, even if he is not dangerous, may use language or conduct himself in such a way as to disturb the peace and shock the sense of decency of other passengers, and one in that condition is not entitled to demand that he be received or recognized by a railroad company as a passenger. Now, of course, that doesn't mean that a railroad company can reject one merely because he has taken a drink of whiskey, or merely because you may detect

the intoxicant upon his breath, or merely because he may conduct himself a little different from other people. There must be some substantial reason; he must be in such a condition that there is reasonable ground to expect that he will either not be able to take care of himself, or in other words, that he himself will be in danger, or that he will endanger some other person, or that, as I have already stated, he will do things that will shock or disgust other people.

“Now if you should find from the evidence in this case that when the defendant came there upon the platform, and just about the time the accident occurred, he was so far intoxicated that, under the instructions which I have just given you, he had no right to demand passage upon the train, then he was not a passenger, and he could not demand that he be recognized as a passenger by the railroad company, and he would not have the rights of a passenger, and the company’s only obligation to him would be to avoid doing him any wilful wrong, that is, the company could not wilfully inflict an injury upon him because it found that he was upon the platform in that condition. But if he fell off the platform merely because there was no railing there, then if he was so drunk that he couldn’t demand passage the defendant company would not be responsible or liable.

“Now if upon these three questions you find in favor of the plaintiff, that is, you find that this was a station, you find that he came there in good faith to seek passage, and you find that he was not so far intoxicated that he wouldn’t have a right to demand

passage, then you should proceed further, and determine whether or not the defendant company was negligent in the respects alleged in the complaint, that is to say, was it negligent in not having a light at this point at the time in question, and further, in that it did not maintain a railing upon the back or along the back of this platform from which the plaintiff fell. I have to say to you that the mere absence of light would not in itself constitute actionable negligence under the circumstances of the case, but you may consider that question, or that fact, rather, if you find it to be a fact, and as I understand, it isn't disputed (that is, it isn't contended that there was a light there), you may consider the condition of the platform as to light or darkness, in considering the further fact that there was no railing or protection upon the back of this platform, for while you might find that neither the absence of a light nor the absence of the railing in itself was a sufficient cause for the accident and the injury, still if you find that the two conditions combining caused the injury, then you may further consider whether or not the existence of those two conditions, the absence of a light and the absence of a railing, whether these two concurring, constituted negligence on the part of the railway company. In other words, you may consider both facts and determine whether or not the two together constituted negligence. There is no precise measure, gentlemen, no yard stick, by which we can measure the conduct of a railroad company for the purpose of saying whether the particular act

or omission complained of does or does not constitute negligence. That is left to the jury, that question is left to the jury, under certain general rules and upon the application of certain general principles. Some of you have heard me say what this general rule is, that is, negligence, generally speaking, is the doing of some act which under the circumstances an ordinarily prudent person with due regard for the rights of others would not do, or the leaving undone of some thing which under the circumstances an ordinarily prudent person with due regard for the rights of others would do. Now that general principle applies to the railroad company, to a carrier. Of course, it acts through servants and agents and officers, etc., but generally speaking the acts of those agents are the acts of the company itself. Now in this case did the railroad company exercise ordinary care and prudence, having due regard for the rights and safety of passengers seeking passage or leaving their trains at this point, did it have due regard for the rights of these people in maintaining the platform without a railing and without a light? It was bound to use reasonable care to see that people who took passage there or who got off the train there did not suffer injury, and the question for you to determine is whether or not the defendant did use reasonable care, bearing in mind the standard of what reasonable men would ordinarily do, was the care which it exercised commensurate with the danger. Did it do what ordinarily reasonable men, ordinarily prudent men, would have done, having due regard for the rights and safety of

passengers? Now if you should find upon that question also in favor of the plaintiff, that is, if you find that the defendant didn't use reasonable care in these two respects, and further that such want of care was the cause of or contributed to the injury, you still have this further question before you could find in favor of the plaintiff: Did the defendant himself exercise reasonable care? Was the accident in whole or in part the result of his own contributory negligence, as we call it? Now his conduct is to be measured by the same general rule or principle as the defendant's. Under the circumstances, did he act as an ordinarily prudent, reasonable person would have acted, with regard to his own safety? If he was guilty of negligence, and that negligence contributed to his own injury, he cannot recover, even though the defendant may also have been guilty of some negligence contributing to the injury, and upon that point I have this further to say to you: Any evidence of the plaintiff's intoxication will be considered by you in determining whether or not he was thereby shown to be guilty of such contributory negligence as to bar a recovery in his favor. As I have already explained to you, intoxication alone is not a bar to his recovery. That is, a measure of intoxication might not debar him from seeking passage upon the train. That I have fully explained to you, already. So that a measure of intoxication would not bar his recovery, but you may consider his condition in that respect in determining whether or not he acted with reasonable care, for if he failed to exercise the ordi-

nary care which a reasonably careful, sober man would have exercised, then he cannot excuse his negligence by referring it to the fact that he was not able to take care of himself because of intoxication. So, generally upon that point, if you believe as jurors, from all the facts and circumstances in this case, that the plaintiff was intoxicated, and that the real and primary cause of his falling from the platform was due to a state of intoxication, then it would be your duty to return a verdict in favor of the defendant. The law will not permit one to voluntarily place himself in a state of intoxication and then recover damages for an injury sustained which was primarily induced or brought about by reason of such intoxication.

“Now if you find upon all of these points in favor of the plaintiff, that is, if you find he wasn’t guilty of negligence, and that the defendant was, the next question for you to consider is the damages which you will award to him. Here again there is no precise measure. The question is necessarily committed to the good sense of twelve men such as you are, acting as jurors. You are to consider that question as you consider other questions, dispassionately and fairly, with the purpose in good faith to award to him such reasonable damages as he has suffered. You may consider the pain, if any, which he suffered, and his loss of time. You may also consider such impairment if any you find, as is permanent with reference to his physical condition, and such pain, if any, as he will suffer in the future, all, of course, as a result of

this accident. You may also consider the amount that he has necessarily or reasonably paid out, or the expenses that he has incurred, on account of hospital and doctor's services. I have forgotten,—the maximum of that is how much? What is pleaded?"

MR. CORKERY:

"There was \$115.00 pleaded, and the balance would make \$150.00, which has since occurred. We pleaded \$115.00 and we will ask leave to amend. At the time the complaint was drawn it was only \$115.00 but will ask leave to amend so as to show the full amount."

THE COURT:

"Very well. You may amend to that extent. There was no objection to the evidence. So that the pleading as amended would state a maximum amount on these two grounds of doctor's bill and hospital, of \$265.00. That would be the maximum that you could allow upon that account.

"The burden of proof in this case, gentlemen, as in all civil cases, is upon him who alleges the existence of a certain fact. So in this case the burden was upon the plaintiff to show to you by a preponderance of the evidence all of the elements of the claim to which I have drawn your attention, with the exception of contributory negligence. That is, he was bound to show that he offered himself as a passenger, he was bound to show that the defendant Company was negligent, he was bound to show that negligence was the cause of the injury, and that he must show by a preponderance of the evidence. Upon the other

hand, the burden was upon the defendant of showing that he was guilty of contributory negligence, resulting in the accident or bearing upon the accident, and that burden is discharged only when the evidence seems to be of greater weight to you,—not necessarily the greater number of witnesses, but it must be more convincing, of a greater weight. Such is the meaning of the word.

“You are the sole judges of the issues of fact. I am leaving the determination of the facts entirely to you. That being your responsibility, it is also your right and duty to determine, to pass upon, the credibility of the witnesses and the weight to be given to their testimony. You will consider the interest which the witnesses have in the result of the trial, and all other facts and circumstances which, in the common experiences of life, you have learned, bear upon human testimony and tend to make it truthful and reliable, or, upon the other hand, tend to distort or color it.

“All of you must concur in finding a verdict. Two forms of verdict have been prepared. You will have no difficulty in using them. If you find in favor of the plaintiff the one will be used where a blank is left. If you find for the defendant you will use the one which is complete in itself.”

MR. CORKERY:

“If the Court please, the Court misunderstood the amount of the medical bills. We only claim \$150.00. The Court added them together. It is \$150.00 altogether.”

THE COURT:

"You will understand this correction then, gentlemen. I supposed it was \$150.00 in addition to the \$115.00. Counsel now advises me that the maximum claimed on account of both of these accounts is \$150.00 instead of \$265.00.

"Let the bailiff be sworn."

Thereupon the jury, having received the charge of the Court, retired to consider their verdict and thereafter returned into open court the following verdict:

"We, the jury impanelled in the above entitled cause, find for the Plaintiff and assess the damages to be recovered herein at the sum of \$7,500.00.

"MIKE SHINE, Foreman."

DEFENDANT'S LIST OF EXHIBITS.

Defendant's Exhibit 1 was a paper handed the witness La Branch on cross-examination for identification, but was not introduced in evidence.

Defendant's Exhibit 2 is a plat of the survey of the railroad of the defendant showing station at Herrick where the accident happened.

Defendant's Exhibit 3 is a daily record showing arrival and departure of trains at Marble Creek.

Thereafter, and before the time expired within which the defendant was required by law and the rules of the court to serve and deliver to the clerk its proposed Bill of Exceptions, an order was entered upon the written stipulation between Plaintiff and

Defendant extending the time within which the Defendant should serve and file its proposed Bill of Exceptions to the fifteenth day of August, 1917.

Now, in the furtherance of justice and that right may be done, the defendant presents the foregoing as its Bill of Exceptions in this cause, and prays that the same may be settled, allowed, signed and certified by the Judge, as provided by law, and filed as a Bill of Exceptions.

GEO. W. KORTE,
J. F. AILSHIE,
Attorneys for Defendant.

*In the District Court of the United States, for the
District of Idaho, Northern Division.*

BARTHOLOMEW CHAMBERLAIN,

Plaintiff,

vs.

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY, a corporation,

Defendant.

No. 677.

ORDER SETTLING BILL OF EXCEPTIONS.

Now, on this thirty-first day of August, 1917, the above case coming on for hearing on the application of the defendant to settled the Bill of Exceptions in said cause, the defendant appearing by George W. Korte, Esq., and J. F. Ailshie, Esq., its attorneys, and the plaintiff appearing by Messrs. Corkery & Corkery, his attorneys, and it appearing to the Court

that the defendant's proposed Bill of Exceptions was duly served on the attorneys for the plaintiff and filed with the clerk of this Court within the time provided by law and within the time allowed by the stipulation of the parties and the order of the Court extending such time, and that no amendments had been suggested thereto by the plaintiff excepting those which are incorporated in the foregoing Bill of Exceptions; and that the time for settling said Bill of Exceptions has not expired and the Court having duly allowed said proposed Bill of Exceptions; and it further appearing to the Court that said Bill of Exceptions contains all the material facts occurring in the trial of said cause, including the rulings of the Court, together with the exceptions thereto taken and allowed, and all material matters and things occurring upon the trial, except Exhibits introduced in evidence which are hereby made a part of the Bill of Exceptions and the clerk of this Court is hereby ordered and instructed to attach said Exhibits thereto.

Thereupon, upon motion of defendant's attorneys, it is hereby ordered that said proposed Bill of Exceptions with the amendments allowed by this Court, be and the same is hereby settled as a true Bill of Exceptions in said cause, and the same is hereby certified accordingly by the undersigned Judge of this Court who presided at the trial of said cause, as a true, full and correct Bill of Exceptions, and the clerk of this Court is hereby ordered to file the same as a record in said cause and transmit the same to the

Honorable Circuit Court of Appeals for the Ninth Circuit.

FRANK S. DIETRICH,
District Judge.

Lodged August 14, 1917.

Filed August 31, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 677.

PETITION FOR WRIT OF ERROR.

The defendant, Chicago, Milwaukee & St. Paul Railway Company, a corporation, feeling itself aggrieved by the verdict of the jury and the judgment entered thereon in the above entitled cause, comes now by its attorneys and petitions this Honorable Court for an order allowing it to prosecute a writ of error to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and approved, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and that the judgment heretofore rendered be superseded and stayed, pending the determination of said cause in the Honorable Circuit Court of Appeals.

GEO. W. KORTE,
J. F. AILSHIE,
Attorneys for Defendant.

Filed November 20, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 677.

ASSIGNMENTS OF ERROR.

Comes now the defendant, Chicago, Milwaukee & St. Paul Railway Company, and files the following assignments of error upon which it will rely for its prosecution of the writ of error in the above entitled matter in the United States Circuit Court of Appeals for the Ninth Circuit, for relief from the judgment rendered in said cause:

I.

The Court erred in overruling the objections of the defendant to the following questions asked the witness La Branch, and in permitting said witness to answer said questions, as follows:

MR. CORKERY: Q. State what statement he (Chamberlain) made in that connection about going to the train.

MR. KORTE: We object, as hearsay, as self-serving and incompetent.

THE COURT: Objection overruled. You may have an exception.

Q. What did he say as he shook hands with you?

A. He said he was going on the train with me as far as Plummer Junction.

II.

The Court erred in overruling defendant's objections to the following questions asked plaintiff Chamberlain, when on the witness stand, and in permitting said witness to answer said questions, which questions, objections and answers are as follows:

MR. CORKERY: Q. I will ask you if any money was paid to the boys on the speeder, or either of them, that testified here, on account of the passage of yourself or the other men from Marble Creek to Herrick?

MR. KORTE: Objection to this as not on rebuttal. They were bound by the statement of the witnesses when they said that nothing was given to them, and it raises a collateral issue which we are not prepared to meet. It is immaterial. It is on an immaterial issue.

THE COURT: No, I said they had to be bound by the witnesses' statement merely as to the general custom, but as to what occurred at this particular time I think they may rebut that.

MR. KORTE: The issue as to whether or not there was money paid by the men, or by these men, to the men operating the speeder was injected on cross-examination.

THE COURT: The objection is overruled. Exception allowed.

III.

The Court erred in overruling or denying defendant's motion and request for an instructed verdict in favor of defendant, upon the conclusion of the trial and after all the evidence had been submitted in behalf of both plaintiff and defendant.

IV.

The Court erred in denying defendant's petition for a new trial for the reason that there is no substantial evidence to support the verdict and the verdict discloses prejudice, bias and passion on the part

of the jury against defendant, in that there was no evidence whatever showing any loss to plaintiff of wages or earning power or any employment in which plaintiff was engaged or any wage or salary he was receiving, and that the excessive character of the verdict itself disclosed prejudice and passion of the jury and was impliedly recognized by the Court in conditionally granting a new trial unless plaintiff consented to a reduction of the judgment one-third, or \$2,500.00.

SPECIFICATIONS WHERE EVIDENCE IS INSUFFICIENT TO JUSTIFY A VERDICT, OR TO SUPPORT THE VERDICT HEREIN.

I.

There is no evidence in the record, and there was no evidence given which will support or justify the verdict herein, or any verdict against the defendant for any sum whatever.

II.

The overwhelming weight of the evidence discloses, and is to the effect that the plaintiff, at the time he went upon the platform where he claims to have been injured, was not an intended passenger but was a trespasser, and was not entitled to the rights of a passenger.

III.

The evidence clearly shows, without substantial dispute or conflict, that the plaintiff's injury was the result of a risk of which he was fully aware and of which he had as much knowledge as the defendant,

and a risk which he voluntarily assumed, and that said injury resulted in whole or in part from the plaintiff's own reckless misconduct. That plaintiff admitted and so testified that he had been on said platform repeatedly and well knew there was no rail around the same, and that he knew where and at what points said platform was unsafe.

IV.

The evidence clearly shows that the proximate cause of plaintiff's fall from the platform was not the absence of the railing but the result of his stumbling against, or walking around or against, the box or trunk on the platform, and his attempt to walk and move upon said platform after, as he testified himself, he was blinded from the light of the locomotive, and that both his complaint and the evidence discloses that there was no charge of negligence or lack of diligence on the part of the defendant company in maintaining a headlight on the locomotive, or the box or trunk on the platform. The plaintiff admits that he well knew the condition of the platform and that knowing it as he did he attempted to walk around the trunk or box on the far side thereof from the track and on the unsafe side of the platform while the light from the locomotive was shining in his face.

V.

The evidence clearly discloses that the plaintiff was guilty of contributory negligence in that he was in a state of voluntary intoxication at the time of the accident, and that the accident resulted primarily

from such intoxication and at a time when he was loitering or loafing on said platform and while he was exercising no care or diligence for his own safety and at a time when he admits he was attempting to move in a way that discloses his acts to be grossly negligent and careless. There is no evidence whatever showing that the plaintiff has sustained any damage to his earning powers or his capacity to labor and earn wages or compensation the same now as he could before the accident, and the evidence wholly fails to show that he has lost any time whatever on account of the alleged injury since he left the hospital. There is no scintilla of evidence that he cannot earn as much now at any employment or business he ever follows as he ever could earn, and that no financial loss whatever is shown except his hospital fees and expenses.

VI.

The evidence wholly fails to show any actual or substantial damages, or any continued pain or suffering, or any special damages of any kind excepting the sum of \$150 which plaintiff claims to have paid out for medical aid and hospital charges, and the amount of the verdict returned is without support in the evidence and clearly discloses prejudice, bias and passion and a lack of unbiased and deliberate judgment upon the part of the jurors. That the excessive character of said verdict, unsupported by any evidence of plaintiff's occupation or business, or loss of wages or earning power, discloses on its face prejudice, passion and bias on the part of the jury against

defendant, and that the excessive character of said verdict and the prejudice and bias of the jury was impliedly if not directly and positively noticed by the Court in making its order herein conditionally denying defendant's petition for a new trial.

WHEREFORE, defendant, plaintiff in error, prays that the judgment of the Honorable District Court of the United States for the District of Idaho, Northern Division, be reversed and that such directions be given that full force and efficiency may inure to the defendant by reason of its defense of said cause.

GEO. W. KORTE,

J. F. AILSHIE,

Attorneys for Defendant.

Filed November 20, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 677.

ORDER ALLOWING WRIT OF ERROR.

Upon motion of George W. Korte and J. F. Ailshie for the above named defendant, and upon filing a petition for a writ of error and assignment of errors as required by law, it is hereby

ORDERED that a writ of error be and the same is hereby allowed to have reviewed in the Honorable United States Circuit Court of Appeals for the Ninth Circuit the judgment entered herein; and it is further ordered that the amount of bond on said writ of error is hereby fixed at the sum of Six Thousand

(\$6,000.00) Dollars, to be given by the defendant, and on the giving of said bond the judgment heretofore rendered will be superseded pending the hearing of said cause in the Honorable Circuit Court of Appeals.

IN WITNESS WHEREOF the above order is granted and allowed this twentieth day of November, A. D. 1917.

FRANK S. DIETRICH,
Judge.

Filed November 20, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 677.

Service and receipt of true copy of each of the following described papers is hereby acknowledged and admitted this twentieth day of November, 1917.

Assignments of Error.

Petition for Writ of Error.

Order allowing Writ of Error.

Bond on Writ of Error.

Writ of Error.

Order to transmit Exhibits.

Praecipe.

R. B. NORRIS,
ROBERT CORKERY,
Attorneys for Plaintiff and
Defendant in Error.

Filed November 20, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 677.

STIPULATION AS TO SUPERSEDEAS BOND.

It is hereby stipulated and agreed by and between the respective parties, through their attorneys of record, that the amount of the supersedeas bond required to be filed upon the allowance of the writ of error herein may be fixed by the Court in the sum of Six Thouusand (\$6,000.00) Dollars.

Dated this twenty-third day of October, A. D. 1917.

R. B. NORRIS,
CORKERY & CORKERY,
Attorneys for Plaintiff.

GEO. W. KORTE,
J. F. AILSHIE,
Attorneys for Defendant.

Filed November 20, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 677.

BOND ON WRIT OF ERROR.

KNOW ALL MEN BY THESE PRESENTS, that we, Chicago, Milwaukee & St. Paul Railway Company, a corporation, as principal, and National Surety Company, a corporation organized under the laws of the State of New York and authorized to transact business as surety in the State of Idaho, are held and firmly bound unto Bartholomew Chamber-

lain, plaintiff in the above action, in the sum of Six Thousand (\$6,000.00) Dollars for which sum well and truly to be paid to said Bartholomew Chamberlain and his administrator, executor or assign, we bind ourselves, our, and each of our successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals and dated this twentieth day of November, A. D. 1917.

The condition of this obligation is such that whereas, the above named defendant, Chicago, Milwaukee & St. Paul Railway Company, a corporation, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above entitled cause made and entered by the District Court of the United States for the District of Idaho, Northern Division, and,

WHEREAS, the said Chicago, Milwaukee & St. Paul Railway Company, a corporation, desires to supersede said judgment and stay the issuance of execution thereon pending the determination of said cause in the said United States Circuit Court of Appeals for the Ninth Circuit;

NOW, THEREFORE, the condition of this obligation is such that if the above named Chicago, Milwaukee & St. Paul Railway Company, a corporation, shall prosecute said writ of error to effect and pay all necessary costs and damages awarded against it, including the full amount of said judgment and interest, if it shall fail to make good its plea, then this ob-

ligation shall be void, else to remain in full force and virtue.

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,

By Geo. W. Korte, Its Attorney.

NATIONAL SURETY COMPANY,

By Geo. W. Allen, Resident Vice President.

Signature unintelligible,

Resident Assistant Secretary.

(Corporate Seal.)

APPROVED this twentieth day of November, A.
D. 1917.

FRANK S. DIETRICH,
Judge.

Filed November 20, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 677.

ORDER TO TRANSMIT EXHIBITS.

It is hereby ordered that the exhibits used in the trial of the above entitled cause in the United States District Court be, by the clerk of said Court, transmitted with a transcript on appeal to the United States Circuit Court of Appeals at San Francisco, California.

Done in open Court this twentieth day of November, A. D. 1917.

FRANK S. DIETRICH, Judge.

Filed November 20, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 677.

PRAECIPE FOR TRANSCRIPT OF RECORD.
TO THE CLERK OF THE ABOVE NAMED
COURT:

You will please prepare a transcript, and send to the clerk of the Circuit Court of Appeals, of the following records, to-wit:

Notice of Petition for Removal.

Petition for Removal.

Bond for Removal.

Order Removing Cause to Federal Court.

Complaint.

Answer.

Verdict of Jury.

Judgment.

Petition for New Trial.

Order Modifying the Judgment and Denying Petition for New Trial.

Stipulation extending Time for Filing and Signing Bill of Exceptions to August 15, 1917.

Stipulation extending time for Filing and Signing Bill of Exceptions to September 1, 1917.

Bill of Exceptions.

Petition for Writ of Error.

Assignments of Error.

Order allowing Writ of Error.

Writ of Error.

Stipulation fixing the amount of Supersedeas Bond.

Bond.

Citation.

Order to Transmit Exhibits.

Praecipe for Transcript of Record.

GEO. W. KORTE,

J. F. AILSHIE,

Attorneys for Defendant.

Filed November 20, 1917.

W. D. McReynolds, Clerk.

*United States Circuit Court of Appeals
for the Ninth Circuit.*

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY,

Plaintiff in Error,

vs.

BARTHOLOMEW CHAMBERLAIN,

Defendant in Error.

No. 677.

WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States to the Honorable,
the Judge of the District Court of the United
States for the District of Idaho, Northern Divi-
sion, GREETING:

Because in the records and proceedings, as also in
the rendition of the judgment, of a plea which is in
the said District Court before you, or some of you, be-
tween the Chicago, Milwaukee & St. Paul Railway
Company, plaintiff in error, and Bartholomew
Chamberlain, defendant in error, a manifest error
hath happened to the great damage of the said Chi-

cago, Milwaukee & St. Paul Railway Company, a corporation, the plaintiff in error, as by its petition herein appears:

That, being willing that error, if any, hath happened, should be duly corrected and full and speedy justice be done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco in the State of California within thirty days from the date hereof, in the said Circuit Court of Appeals, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause to be done further therein to correct that error, what of right and according to law and customs of the United States should be done.

WITNESS the Honorable Edward Douglas White, Chief Justice of the Supreme Court of the United States and the seal of this Court, this twentieth day of November, in the year of our Lord one thousand nine hundred and seventeen.

W. D. McREYNOLDS,
Clerk of the District Court of the
United States for the District of
Idaho, Northern Division.

(Seal.)

Allowed by

FRANK S. DIETRICH, District Judge.

Service of the within writ of error and receipt of
a copy thereof is hereby acknowledged this.....
day of....., A. D. 1917.

Attorneys or Defendant in Error.

Filed Nov. 20, 1917.

W. D. McREYNOLDS, Clerk.

*United States Circuit Court of Appeals for the
Ninth Circuit*

CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY,

Plaintiff in Error,

vs.

BARTHOLOMEW CHAMBERLAIN,

Defendant in Error.

No. 677.

CITATION.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America to
Bartholomew Chamberlain, Defendant in Error,
GREETING:

You are cited and admonished to be and appear in
the United States Circuit Court of Appeals for the
Ninth Circuit at the court room of said court in the
city of San Francisco and State of California, within
thirty days from the date of this citation, pursuant
to a writ of error on file in the clerk's office of the Dis-
trict Court of the United States in and for the Dis-

trict of Idaho, Northern Division, wherein the Chicago, Milwaukee & St. Paul Railway Company, a corporation, is plaintiff in error, and Bartholomew Chamberlain is defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Edward Douglas White, Chief Justice of the United States, this twentieth day of November, A. D. 1917.

FRANK S. DIETRICH,
United States District Judge.

(Seal.)

Attest:

W. D. McReynolds, Clerk.

Service of the foregoing Citation admitted and a true copy thereof received this twentieth day of November, A. D. 1917.

R. B. NORRIS,
ROBERT CORKERY,
Attorneys for Defendant in Error.

Filed Nov. 20, 1917.

W. D. McREYNOLDS, Clerk.

RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United

States Circuit Court of Appeals for the Ninth Circuit and the same is transmitted accordingly.

W. D. McREYNOLDS,

(Seal)

Clerk.

(Title of Court and Cause.)

No. 677.

CLERK'S CERTIFICATE.

United States of America,
District of Idaho,—ss.

I, W. D. McReynolds, clerk of the United States District Court for the District of Idaho, Northern Division, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, in pursuance of the command of the writ of error herein, there is herewith transmitted transcript of pages from 1 to 212, inclusive, being a full, true and correct copy of the record papers and other proceedings in the above entitled cause, as called for by the plaintiff in error in its Praecipe as the same appears thereon, original records and files of said Court in my possession as such clerk; I further certify and return that I have annexed to said transcript and included in said paging the original writ of error and citation in said cause.

I further certify that I herewith transmit all the original Exhibits on file in said action in pursuance to the order of this Court.

I further certify that the fees of the Clerk of this

Court for preparing, printing and certifying said transcript on appeal amount to the sum of \$246.20, and that the same have been paid in full by the plaintiff in error, the Chicago, Milwaukee & St. Paul Railway Company.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court in said district, this 14th day of December A. D. 1917.

W. D. McREYNOLDS,

(Seal)

Clerk.

United States
Circuit Court of Appeals
For the Ninth District

CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,

Plaintiff in Error.

vs.

BARTHOLOMEW CHAMBERLAIN,
Defendant in Error.

8087

Brief of Plaintiff in Error

*Upon Writ of Error from the United States District Court for
the District of Idaho, Northern Division.*

GEO. W. KORTE,
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Seattle, Washington,

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United States
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CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY,

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BARTHOLOMEW CHAMBERLAIN,

Defendant in Error.

STATEMENT OF THE CASE.

(NOTE: For convenience we will refer to plaintiff in error as *defendant* and to defendant in error as *plaintiff*. Italics herein are ours).

This action was brought by Bartholomew Chamberlain against the Chicago, Milwaukee & St. Paul Railway Company, on account of personal injuries alleged to have been received by him on November 15, 1916, in falling from a platform owned by the defendant company, and situated between its main line and a side track, at Herrick, Idaho. The complaint alleged that prior to October 1, 1916 there was, at Herrick, Idaho, a depot and platform constructed between a siding and the main line of the C. M. & St. P. Railway Co., that at that point the tracks were elevated above the natural level of the ground about ten feet, and that the depot was constructed upon posts about ten feet high, and that the platform extended

from the depot building out to the main track, a distance of about eleven feet; that about October 1, 1916 the depot building was removed, but that the platform extending to the main line, being about 11 ft. wide and 80 ft. long, was left, and that the side of the platform where it formerly joined the depot building was elevated above the ground about ten feet. The complaint also alleged that after moving the depot building defendant used the platform for receiving and discharging passengers and their baggage to and from its trains. Negligence on the part of the defendant railway company is charged in that no guard or railing was placed at the edge of the platform where it had formerly been joined to the depot building, and that the platform was not lighted at night. The plaintiff alleged that on November 15, 1916, while waiting for a west-bound train, on which he intended to take passage, the plaintiff fell from this platform, sustaining injuries which necessitated his remaining in a hospital from the time of the accident, November 15, 1916, until December 2, 1916, for which he incurred an expense of \$150, and that by reason of such injuries, and their permanent and lasting nature, he was damaged in the further sum of \$15,000.

The defendant in its answer, after denying all the material allegations of the complaint, alleged that such injuries as the plaintiff sustained were due wholly and alone to the negligence, fault and carelessness of the plaintiff, in that he failed to observe his surroundings, which were apparent to anyone, and that he was well aware of the conditions complained of, or could have been aware of them by the exercise of ordinary

care or by the use of his eyesight and other senses, at the time when he claimed he met with the injury.

The scene of this accident was along the line of the Milwaukee railroad, which follows the St. Joe River, through a deep canyon, where logging and lumbering are carried on extensively, and where the population is chiefly lumberjacks and mill workers, and employees generally in the woods and about the mills. Chamberlain had lived for many years on his claim across the river opposite the siding at Herrick, and had been acquainted with the station siding and grounds from the time the road was constructed. He had witnessed its construction, and all the changes that had been made in the premises. His house was in sight of the station. He was accustomed to cross the river in his canoe and had hauled the little hay which grew on his claim across the river in a canoe and sold it to some one living on the side the station is on. In the forenoon of the day of this accident Chamberlain walked up the track to Marble Creek, and remained at Marble Creek until sometime in the afternoon. During that time it appears that he was drinking more or less. He and a couple other men with whom he had been associating, started down the track in the direction of Herrick sometime in the afternoon, (p. 135-142). In the afternoon of that day two employees of the railroad company, Ernster and Hodges, (p. 135-137) who were "signal maintainers" for the company, started on what is called a speeder, (a little gasoline handcar) down the track from Marble Creek to Herrick, and soon after leaving Marble Creek they came in sight of Chamberlain and his associates, and some one of them flagged the men on the speeder and they stopped and took them on and

carried them down to somewhere in the neighborhood of Herrick. Ernster, one of the signal maintainers, testified: (p. 138)

"They were all walking down the track and they were all staggering, and they flagged us down and wanted to know if we would carry them down to Herrick, and I thought it best to do so on account of their drunken condition. * * * * I thought it would be best to take them down there, that I was doing the right thing, because it is awful crooked track, and trains come down that hill awful quiet, and if they weren't on the alert they would probably get run over."

These men loafed around in the neighborhood of Herrick and apparently up and down the track until the evening west-bound train came along, which was about 5:18 to 5:20 (p. 168). Several persons were gathered on the platform at the Herrick Siding when the train arrived that evening. Some one had brought a box or a trunk and placed it on the platform so that it was at the outer edge of the platform on the side farthest from the track. According to one witness, Chamberlain was sitting on this box when the train pulled in, and as he got up, on the arrival of the train, and started to walk he staggered and fell off the platform. According to his own story, however, he was looking in the direction of the approaching train and as the glare of the headlight from the train struck him in the face and blinded him he started to walk around the trunk, going on the outer side, and stepped off the platform and fell down onto a log or stump below. A depot had previously stood at that place, and had been removed. When the depot was taken away there was no railing placed along the platform at the place where the depot had stood. Chamberlain had been present when the depot was

removed, saw it removed, and had been at the station practically every day since its removal, knew the length and width of the platform, and its height from the ground, and knew that no railing was there, and he had seen the platform and its condition both on the morning and afternoon of the day when the accident occurred, and knew that no railing had been put up, and he also knew that the trunk or box was on the platform and its location. He was more minutely acquainted with all the conditions at that place and had been more intimately acquainted with them from the time the road was built there, than any other single individual, so far as the record discloses. Later on in this brief we will quote at length from the evidence as given by the plaintiff and his witnesses on the question of negligence or the absence of negligence on the part of the railroad company, and showing the action and conduct of the plaintiff, and his own knowledge and neglect, and also the evidence as to the character and nature of his injuries.

SPECIFICATION OF ERRORS.

Defendant specifies and assigns the following errors:

I.

The court erred in overruling the objections of the defendant to the following questions asked the witness LaBranch and in permitting said witness to answer said questions, as follows:

MR. CORKERY: Q. State what statement he (Chamberlain) made in that connection about going to the train.

MR. KORTE: We object as hearsay, as selfserving and incompetent.

THE COURT: Objection overruled. You may have an exception.

Q. What did he say as he shook hands with you?

A. He said he was going on the train with me as far as Plummer Junction.

II.

The court erred in overruling defendant's objections to the following questions asked plaintiff Chamberlain, when on the witness stand, and in permitting said witness to answer said questions, which questions, objections and answers are as follows:

MR. CORKERY: Q. I will ask you if any money was paid to the boys on the speeder, or either of them, that testified here, on account of the passage of yourself or the other men from Marble Creek to Herrick?

MR. KORTE: Objection to this as not on rebuttal. They were bound by the statement of the witnesses when they said that nothing was given to them, and it raises a collateral issue which we are not prepared to meet. It is immaterial. It is on an immaterial issue.

THE COURT: No, I said they had to be bound by the witnesses' statement merely as to the general custom, but as to what occurred at this particular time I think they may rebut that.

MR. KORTE: The issue as to whether or not there was money paid by the men, or by these men, to the men operating the speeder was injected on cross-examination.

THE COURT: The objection is overruled. Exception allowed.

III.

The court erred in overruling, or denying defendant's motion and request for an instructed verdict in favor of defendant, upon the conclusion of the trial and after all the evidence had been submitted in behalf of both plaintiff and defendant; (p. 180)

a. Because the evidence clearly shows, without substantial dispute or conflict, that the plaintiff's injury was the result of a risk of which he was fully aware and of which he had as much knowledge as the defendant, and a risk which he voluntarily assumed, and that said injury resulted in whole or in part from the plaintiff's own reckless misconduct. That plaintiff admitted and so testified that he had been on said platform repeatedly and well knew there was no rail around the same, and that he knew where and at what points said platform was unsafe.

b. Because the evidence clearly shows that the proximate cause of plaintiff's fall from the platform was not the absence of the railing but the result of his stumbling against, or walking around or against, the box or trunk on the platform, and his attempt to walk and move upon said platform after, as he testified himself, he was blinded from the light of the locomotive, and that both his complaint and the evidence discloses that there was no charge of negligence or lack of diligence on the part of the defendant company in maintaining a headlight on the locomotive, or the box or trunk on the platform. The plaintiff admits that he well knew the condition of the platform and that knowing it as he did he attempted to walk around the trunk or box on the far side thereof from the track and on

the unsafe side of the platform while the light from the locomotive was shining in his face.

c. Because the evidence clearly discloses that the plaintiff was guilty of contributory negligence in that he was in a state of voluntary intoxication at the time of the accident, and that the accident resulted primarily from such intoxication and at a time when he was loitering or loafing on said platform and while he was exercising no care or diligence for his own safety and at a time when he admits he was attempting to move in a way that discloses his acts to be grossly negligent and careless. There is no evidence whatever showing that the plaintiff has sustained any damage to his earning powers or his capacity to labor and earn wages or compensation the same now as he could before the accident, and the evidence wholly fails to show that he has lost any time whatever on account of the alleged injury since he left the hospital. There is no scintilla of evidence that he cannot earn as much now at any employment or business he ever follows as he ever could earn, and that no financial loss whatever is shown except his hospital fees and expenses.

d. Because the evidence wholly fails to show any actual or substantial damages, or any continued pain or suffering, or any special damages of any kind excepting the sum of \$150 which plaintiff claims to have paid out for medical aid and hospital charges, and the amount of the verdict returned is without support in the evidence and clearly discloses prejudice, bias and passion and a lack of unbiased and deliberate judgment upon the part of the jurors. That the excessive character of said verdict, unsupported by any evidence of plaintiff's occupation or business, or loss of wages or earning power, discloses

on its face prejudice, passion and bias on the part of the jury against defendant, and that the excessive character of said verdict and the prejudice and bias of the jury was impliedly if not directly and positively noticed by the court in making its order herein conditionally denying defendant's petition for a new trial.

e. Because there is no evidence in the record, and there was no evidence given which will support or justify the verdict herein, or any verdict against the defendant for any sum whatever.

f. Because the overwhelming weight of the evidence discloses, and is to the effect that the plaintiff, at the time he went upon the platform where he claims to have been injured, was not an intended passenger but was a trespasser, and was not entitled to the rights of a passenger.

IV.

The court erred in denying defendant's petition for a new trial for the reason that there is no substantial evidence to support the verdict and the verdict discloses prejudice, bias and passion on the part of the jury against defendant, in that there was no evidence whatever showing any loss to plaintiff of wages or earning power or any employment in which plaintiff was engaged or any wage or salary he was receiving, and that the excessive character of the verdict itself disclosed prejudice and passion of the jury and was impliedly recognized by the court in conditionally granting a new trial unless plaintiff consented to a reduction of the judgment one-third, or \$2,500.00.

ARGUMENT.

SPECIFICATIONS OF ERROR I AND II.

The statement made by plaintiff before he *became a passenger and in the absence of any agent or representative of defendant, and before he had purchased a ticket or paid any fare, and while he was either a trespasser or at most a mere invitee* upon defendant's platform was the merest hearsay and purely selfserving and obnoxious to all recognized rules of evidence. See page 84 of the transcript.

The testimony of plaintiff (p. 174, 176) to the effect that some one paid the "signal maintainers" a certain sum for allowing plaintiff and his companions to ride on the speeder was not only erroneous but it was grossly prejudicial and could have had no other effect than that of prejudicing the jury. What possible connection could there be between plaintiff riding on this speeder and some one paying the man in charge a half dollar and the alleged falling from a station platform some distance away, several hours thereafter;—and certainly the acceptance of fifty cents for the service, if that was actually paid, could in no way bear on either the competency or veracity or credibility of the witness. *Its only effect could be to prejudice the jury.*

SPECIFICATIONS OF ERROR III.

Under this specification we shall discuss the insufficiency of the evidence to support the verdict and in doing so will call the court's attention to the failure of the evidence to show (a) any negligence on the part of defendant, and (b) the failure of the evidence to show any permanent injury or damage by the loss of salary, wages or earning power or any permanent or lasting disability, pain or suffering by plaintiff. We shall

likewise point out and consider (c) that plaintiff had full knowledge of all the conditions and surroundings and had known them at all times since the platform was constructed, and that (d) he knew the trunk was on the platform, and knew the width and condition of the platform and its elevation above the surface of the ground, and (e) that his own testimony shows that he was guilty of such negligence himself as was both in fact and law the direct and proximate cause of the injury.

DEFENDANT EXERCISED "ORDINARY CARE" AND PLAINTIFF WAS
GUILTY OF NEGLIGENCE.

The accident complained of did not occur while plaintiff was a passenger. It happened on the platform before he had become a passenger and *at a place and time* where and when the company owed him the duty of only *ordinary care* such as the grocer or butcher owes his customer while in his place of business.

The railroad company owed to plaintiff the exercise of only "ordinary care," that is, such care as a "reasonably prudent person under the same circumstances" would exercise.

Elliott on Railroads, Vol. 4, at Sec. 1590, states the rule as follows:

"A railroad company is under a duty to exercise ordinary and reasonable care to so construct and maintain station buildings, or depots and appurtenances, that they shall be safe for use by passengers. The duty respecting the construction and maintenance of station buildings is not so rigorous as that imposed upon railroad carriers in relation to roadbeds, tracks, cars, appliances, and the like. Some of the cases seem to lose sight of the difference between the duty respecting station buildings and that respecting means and modes of conveyance, but the well-reasoned cases recognize the distinction and affirm that a railroad company that exercises ordinary

care in constructing and maintaining station buildings and appurtenances in a reasonably safe condition for use is not guilty of negligence."

The trial court instructed the jury in the present case in line with the foregoing rule. (Trans. p. 186-187).

The Supreme Court of Arkansas in *Chicago, R. I. & P. Ry. Co. v. Owens*, 177 S. W. 8 quotes the foregoing text from Mr. Elliott with approval and says:

"The steps of the train constitute a part of the appliances for the accommodation of passengers boarding and debarking, and the rule of care is the same as if the train was in actual motion; the reason being that the passenger is at that time within the entire control of those who are responsible for the handling of the train. Such is not the case, however, *when a passenger is out on the platform, and is merely seeking to board the train, and the rule in those cases is that only ordinary care is required; or, in other words, such care as can be measured by the conduct of a reasonably prudent person under the same circumstances.*"

The Supreme Court of the United States in *Atchison, T. & S. F. Ry. Co. v. Calhoun*, 213 U. S. 1 (53 L. Ed. 671), speaking through Mr. Justice Moody has said:

"Leaving entirely out of view, then, the original carelessness of the defendant, we come to the real issue, which was submitted to the jury, upon which alone its verdict can stand. Was the company guilty of negligence in leaving the truck in a dangerous position and not having the depot platform properly lighted, and did that condition directly and proximately cause the injury?

It cannot be doubted that the conduct of Jones was careless in the extreme, though doubtless the motives which impelled him were good. But it is urged that Jones' negligence concurred with the negligence of the defendant in leaving the truck where it did, and that therefore both are responsible for the consequences. There is no doubt that the act of Jones and the act of the defendant with respect to the track concurred in causing the injury, and

we assume that, if the defendant failed in its duty by leaving the truck at the end of the wooden platform, the verdict can be sustained. *Washington & G. R. Co. v. Hickey*, 166 U. S. 521, 41 L. Ed. 1101, 17 Sup. Ct. Rep. 661. It becomes necessary, therefore, to inquire whether the defendant was negligent in leaving the truck there. But, even where the highest degree of care is demanded, still the one from whom it is due is bound to guard only against those occurrences which can reasonably be anticipated by the utmost foresight. It has been well said that, *'if men went about to guard themselves against every risk to themselves or others which might, by ingenious conjecture, be conceived as possible, human affairs could not be carried on at all.*' The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.' *Pollock, Torts*, 8th Ed. 41.

In judging of the defendant's conduct, attention must be paid to the place where the truck was left. If it had been left where the passengers were at all likely to get off or on the train, and a passenger stumbled over it to his hurt, there could be no doubt of the liability of the railroad. On the other hand, if it had been left a mile from the station, where, by no reasonable hypothesis, passengers would attempt to get off or on the train, there could be no doubt that the railroad would not be responsible in such a case. There was a wooden platform by the track at the station, 100 feet, more or less, in length. The truck was left at the very end of this platform, with the greater part off it. The train was at rest, so that no part of it from which passengers might be expected to get off or on was near the truck. It was, of course, dark at the point where the truck was, but no one could foresee that passengers intending to leave or enter the train would be at that point. No amount of human foresight which could reasonably be exacted as a duty could anticipate that a passenger, after the train had started, would run a distance of from 75 to 100 feet with the purpose of boarding a train moving with increasing rapidity; much less that a person would take a helpless infant, and, while thus

running, attempt to place it on the train. We are of the opinion that the railroad was not bound to foresee and guard against such extraordinary conduct, and that its failure to do so was not negligence. For these reasons the judgment must be reversed."

Applying to the instant case the thought of Justice Moody in the foregoing case, we make the parallel inquiry here: By what degree of human foresight could defendant have anticipated or foreseen that plaintiff would come upon its platform at Herrick and see a trunk standing on the outer side of the platform approximately ten feet from the railroad track, and when the train was pulling into the station and while the "glare of the headlight from the engine was blinding his eyes" he would try to walk around the trunk on the farther side from the track and step off the platform? *It was possible, but it was certainly not a probability which the average man would think to guard against.*

The rule is well stated in *St. Louis, I. M. & S. Ry. Co. v. Woods*, 131 S. W. 869, as follows:

"The exercise of ordinary care is the measure of the duty of a public carrier to protect passengers while at stations. Hutchinson on Carriers, Sec. 935, 941; 3 Thompson on Negligence, Sec. 274, 278; Huddleston v. Railway Co., 90 Ark. 378, 119 S. W. 280; Railway Co. v. Wilson, 70 Ark. 136, 66 S. W. 661, 91 Am. St. Rep. 74; Railway Co. v. Barnett, 65 Ark. 255, 45 S. W. 550. The higher degree of care is exacted only during the time in which the passenger has given himself wholly in charge of the carrier—while on the train or getting on or off, for then only is the passenger subjected to the peculiar hazards of that mode of travel, against which the carrier must exercise the highest degree of skill and care. Falls v. S. F. & N. P. Ry. Co., 97 Cal. 114, 31 Pac. 901. But when those extraordinary hazards have ceased, or before they have begun, the degree of care is relaxed as the necessity for it ceases."

It seems evident to us that *plaintiff was guilty of negligence in attempting to pass around the trunk* on the far side of the platform from the railroad track at the time the light "blinded" him. It has been held by the courts in several cases that a person was guilty of negligence who continued to operate an automobile or street car while his eyes were blinded by a glaring or dazzling light from a lamp or headlight in front of him.

In *Jaquith v. Worden*, 132 Pac. 33, 73 Wash. 349, 48 L. R. A. (N. S.) 827, the supreme court of Washington was considering a case where a person had been injured by an automobile that was driven by a person at a time when he was "*blinded by the rays of the headlight of an approaching street car.*" The court in passing upon the question of the driver's negligence under the circumstances said:

"The court was not required at its peril to segregate and define with all its limitations each circumstance which may or may not have contributed to the injury. This is particularly true in the light of Wade's testimony. He said that he was so blinded by the rays of the headlight of the approaching street car that he could not see ahead; that he could not have seen a person, and that he did not see the machine until he struck it; that he was then thrown from his seat, his foot striking the lever, causing the car to increase its speed. Under his own testimony he was guilty of most pronounced negligence. He was proceeding in utter disregard of the presence of other travelers or objects ahead of him. Had he been without eyes or had he closed them, he would have been in no worse position. To proceed at all in the face of those conditions was at his peril."

In the very recent case of *Foster v. Cumberland County Power & Light Co.*, 100 Atl. 833, L. R. A. 1917E 1044, the supreme court of Maine was considering an accident caused

by a street car while "the eyes of the motorman and his companion were so blinded by the lights of an approaching automobile that they were unable to see anything in front of them," and "the motorman at once shut off his power, rang his gong and allowed the car to coast at a speed of six or eight miles per hour." When the motorman's eyes recovered their power of sight, he saw for the first time a wagon in front of him partly on the track, and before he could stop the accident occurred. Referring to this part of the case the court said:

"Upon this evidence we conclude that the defendant, although apparently doing all within its power to stop the car on perceiving the wagon, was negligent in not reducing the speed to the slowest possible rate or, better, stopping the car altogether, immediately the eyesight of the motorman was affected."

Some recent decisions are cited in the note to the foregoing case at pages 1045 and 1046 of L. R. A. 1917E, holding to the same effect as the main case.

In the recent case of *Hammond v. Morrison*, 100 Atl. 154, the New Jersey court was considering the conduct of the driver of an automobile who failed to stop his car when he was temporarily blinded by the reflection of street lights upon the wind shield of his car, and as a result thereof the conductor of an approaching street car was killed. The court among other things said:

"No man is entitled to operate an automobile through a public street blindfolded. When his vision is temporarily destroyed in the way which the defendant indicated, it is his duty to stop his car, and so adjust his wind shield as to prevent its interfering with his ability to see in front of him. The defendant, instead of doing this, took the chance of finding the way clear, and ran blindly into the trolley car behind which the decedent was standing. Hav-

ing seen fit to do this, he cannot escape responsibility if his reckless conduct results in injury to a fellow being.”

The same principal as announced in the foregoing authorities is upheld in *Spoatea v. Berkshire St. R. Co.*, 99 N. E. 467, 212 Mass. 599, 42 L. R. A. (N. S.) 876, and in *Gliddon v. Bangor R. & Electric Co.*, 92 Atl. 185.

In *Buzick v. Todman*, 162 N. W. 259, the supreme court of Iowa held a person guilty of negligence for continuing on his way and causing an accident who testified that the lights of an automobile dazzled his eyes so that he could not see objects in front of him, and held that it was his duty to have stopped his car or vehicle until he could see, or the cause of his being blinded was removed.

In line with the foregoing authorities we maintain that it was gross negligence of plaintiff, to attempt to pass around the trunk while the headlight from the locomotive was blinding his eyes.

If it be granted, for the sake of argument, that defendant was negligent in not maintaining a rail along the back side of the platform, still defendant could not have *reasonably foreseen* that some one would *place a trunk on the back edge of the platform* and that plaintiff or any one else would attempt to walk around *back of the trunk* with the *headlight of a locomotive* at the same time *blinding his eyes*.

“According to the usual experience of mankind, ought this result to have been apprehended? The question is not whether it was a *possible* consequence, but whether it was *probable*; that is, *likely to occur, according to the usual experience of mankind*. That this is the true test of responsibility, applicable to a case like this, has been held in very many cases, according to which a wrongdoer is not responsible for a consequence which is merely possible, according to occasional experience, but only for a consequence which is probable, according to ordinary and usual experience.”

(Stone v. Boston & A. R. Co. 51 N. E. 3).

In Kelley v. Manhattan Railway Co. 20 N. E. 383, Justice Peckham comments upon the various degrees of care and diligence the carrier owes to its passengers particularly while the passenger has absolute control of himself, as distinguished from such time as the company has control over him. The court says:

“The rule in relation to the liability of railroad corporations for injuries sustained by passengers under such circumstances as this case develops differs from that which obtains in the case of an injury to a passenger while he is being carried over the road of the corporation, and where the injury occurs from a defect in the roadbed, machinery, or in the construction of the cars, or where it results from a defect in any of the appliances such as would be likely to occasion great danger and loss of life to those traveling on the road. The rule in the latter case requires from the carrier of passengers the exercise of

the utmost care, so far as human skill and foresight can go, for the reason that a neglect of duty in such a case is likely to result in great bodily harm, and sometimes death, to those who are compelled to use that means of conveyance. As the result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accident. See *Hegeman v. Railroad Corp.*, 13 N. Y. 9. But in the approaches to the cars, *such as platforms, halls, stairways, and the like, a less degree of care is required*; and for the reason that the consequences of a neglect of the highest skill and care which human foresight can attain to are naturally of a much less serious nature, the rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended. We have lately had cases of this character before us, and in the case of *Lafflin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. Rep. 599, where a passenger was injured in stepping from a car onto the platform, because, as he alleged, the platform was too far from the steps of the car, this rule was announced, (opinion per Earl J.): *'The company was not bound so to construct this platform as to make accidents to passengers using the same impossible, or to use the highest degree of diligence to make it safe, convenient, and useful. It was bound simply to exercise ordinary care, in view of the dangers attending its use, to make it reasonably adequate for the purpose to which it was devoted.'*"

In *Falls v. San Francisco & N. P. R. Co.* (Cal.) 31 Pac. 901, plaintiff while about to take the train stumbled over an obstacle on the station platform, later found to be a milk can, was injured and claimed the defendant company was negligent in providing an unsafe station platform. The court discussed the question of diligence on the part of the railroad company in maintaining its station platforms as follows:

"In *Thompson's Carriers of Passengers* it is said, (page 104) 'The carrier's liability in respect of the condition of his premises is neither greater nor less than that of any person to another, who by invitation or in-

ducement, express or implied, has come upon his premises for the purpose of transacting business. *A duty of protection is owed to such persons by the carrier, but it is needless to remark that this does not amount to a warranty of the safe condition of the premises; neither is the carrier held bound to bestow upon their condition that extraordinary degree of vigilance which the law, from motives of the soundest policy, imposes upon him in regard to the carriage of his passengers.* The passenger while in actual progress upon his journey is exposed to countless hazards, gives himself wholly in charge of the carrier. * * * But a rule properly ceases with the reason for it; therefore, as a passenger's entrance to the carrier's station is characterized by none of the hazards incident to the journey itself, the rigor of the rule above announced is justly relaxed, in that at such a time and place the carrier is bound to exercise only a reasonable degree of care for the protection of his passengers.' Penn. Co. v. Marion, 104 Ind. 242, 3 N. E. Rep. 874. *'The rule in such cases is that the carrier is bound simply to exercise ordinary care in view of the dangers to be apprehended.'* Kelly v. Railroad Co., 112 N. Y. 443, 20 N. E. 383. Whether there has been an exercise of such care depends upon the circumstances of the case,—the nature of the road and the character of the traffic and place where the accident occurred. *Thus it has been held that 'at a mere way or flag station, where trains do not regularly stop for the reception and discharge of passengers, and only stop when they are flagged, or to discharge a special passenger, a passenger need not expect or rely upon the company's having furnished a platform or other convenient place for the reception and discharge of passengers.'*"

Herrick was only a *flag station* and no agent was kept there (p. 170, 45) so that it would clearly not have been negligence on the part of the Company had it not maintained any platform at all at that station. (2 Hutchinson on Carriers. Sec. 929). No complaint is made of this platform except that there was no railing along the far side from the track.

In Western Union Telegraph Co. v. Catlett, 177 Fed. 71, at page 77, the case of Atchison R. R. Co. v. Calhoun, 213

U. S. 1, 53 Law Ed. 671, is followed and the quotation from Sir Frederick Pollock is applied:

“The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his precaution by the measure of what appears likely in the known course of things.”

The Atchison case is again cited, quoted from and followed in *Chicago B. & Q. Ry. Co. v. Richardson*, 202 Fed. 841.

In *Lafflin v. Buffalo & S. W. R. Co.*, 12 N. E. 599, Justice Earle, speaking for the Court of Appeals of New York, said:

“There was no evidence that any accident had ever happened at that station before on account of the construction of the platform, or that there had ever been any complaint in reference to it. On the contrary the evidence shows that the platform had been used for many years by men, women, and children, and that no one but the plaintiff had ever been injured, or had suffered any inconvenience, on account of the distance of the platform from the cars. Thousands of men, women, and children must have passed from the cars to this platform in entire safety. Under such circumstances, how can it be properly said that the defendant was guilty of any carelessness in its construction and maintenance? *It was not bound so to construct this platform as to make accidents to passengers using the same impossible*, or to use the highest degree of diligence to make it safe, convenient, and useful. *It was bound simply to exercise ordinary care, in view of the dangers attending its use; to make it reasonably adequate for the purposes to which it was devoted.* In the case of a platform which had always been safe, and answered its purpose for men, women, and children, in all kinds of weather, by night and by day, for many years, what was there to suggest to any prudent person any change or improvement for the purpose of making it more safe or convenient?”

Pennsylvania R. Co. vs. O'Neil (C. C. A.) 204 Fed. 584,

is a case very much in point in the present case. Helen O'Neil, an intending passenger, in stepping back from the ticket office on the wharf, fell over a sign which stood about six feet from the movable ticket office. In disposing of the question of negligence on the part of plaintiff, and the care which the passengers must take in their own protection, the court said:

"There is no testimony that an accident of any kind had occurred from the use of this sign before. We have not been able to find an authority where such an act has been held to be a fault. The court can take judicial notice of the fact that in railroad stations, theater offices and other similar places, it is customary to place bars and registering turnstiles opposite the office to keep the crowd orderly and in line. It is manifest that if a purchaser suddenly steps back against these structures, he is liable to fall or receive injuries. But the books record no case, so far as we can find, where a party has recovered for injuries so received. *The reason is manifest; the law expects every one entering such places to keep his eyes open and not to stumble over a perfectly obvious obstruction.* The photographs show that the pier in question was occupied by freight, wagons, baggage trucks and many other objects which a blind man might stumble over, but which any one with his senses unimpaired would certainly avoid. *That the sign in question was in plain sight is admitted, that the plaintiff saw it is admitted. To hold that the defendant is responsible because she stumbled over it carries the rule of negligence to such limits that the carrier becomes an insurer of all who are injured while rightfully on its premises."*

In the case at bar Chamberlain testifies to knowing of the condition of the platform and the lack of a railing, and to seeing it in both the forenoon and afternoon of the same day of the accident.

In *St. Louis I. M. & S. Ry. Co. v. Barnett*, 45 S. W. 550, the Supreme Court of Arkansas, in discussing the duty a rail-

road company owes its passengers in maintaining a *safe* platform around its station, said:

“What is that duty? Railroads, according to the decided weight of authority, must exercise ordinary care in providing station platforms that will secure their passengers, in so far as such care can do so, against any injury that may result in the use of them. 1 Fetter, Carr. Pass. Sec. 47; Kelly v. Railway Co., 112 N. Y. 443, 20 N. E. 383; Lafflin v. Railroad Co., 106 N. Y. 136, 12 N. E. 599; Taylor v. Penn. Co., 50 Fed. 755; 4 Elliott, R. R. Sec. 1590, and cases cited; Hutch. Carr. Sec. 521a; Moreland v. Railroad Co., 141 Mass. 31, 6 N. E. 225. Such ‘ordinary care’ is that which a man of ordinary prudence would exercise under the circumstances to accomplish the end in view, namely, the safety of the passenger. As was said in Banking Co. v. Ryles, 84 Ga. 420, 11 S. E. 499, ordinary care ‘is a relative, and not an absolute, term. The degree of care and foresight which it is necessary to use (in any given case) must always be in proportion to the nature and magnitude of the injury that will be likely to result from the occurrence which is to be anticipated and guarded against.’ * * * * Measured by the law as thus announced, the instruction above quoted was susceptible of misconstruction by the jury, inasmuch as they might have concluded therefrom that the railroad was bound to provide a platform that was absolutely safe.”

To same effect see:

Penn. Co. vs. Marion, (Ind.), 3 N. E. 874.

HOW THE ACCIDENT OCCURRED.

Now, keeping in mind the rule of law that must be applied to this case, let us turn to the evidence and see if defendant has been guilty of negligence and if plaintiff used reasonable care while waiting or loitering at defendant’s station. Chamberlain, the plaintiff, testified, (pages 47 to 50);

Q. And you walked down the track for about what distance?

A. I walk down the track, it must be pretty near a quarter of a mile, until I met this man.

Q. Then did you return to the depot?

A. We come as far as this bridge. There is a bridge across Big Creek, and we sat there, and to where, if I could hear the train, we feel I could walk fast enough to make that train. We sat there until it must be close to seven or half past six or seven, until I hear the train coming, and he told me to, this man Robinson, he said, "Bart, I think you had better go; I hear the train," and I said "Yes, I hear it too."

Q. You went on down to the depot?

A. I walk right on down to the depot. Just then the train had come through this tunnel; this tunnel come through there about a mile or better, or somewhere near a mile. Well, then I got to the depot, and I met some of the fellows there, and says, "I am going." "Well, Bart," they said, "I bid you good bye," and I says, "I am going on the same train," and just then the train was coming around, and there was a box or a trunk right on that platform, and as I was coming I just stepped right around to go behind this, so as to catch the train. When they stop there is always a space behind that you have got to go at the other end of the depot, on the east end of the depot. *So then as I went to go around that trunk, some way, I don't know, I just made a step, the same as usual, and off I went, off, and of course I know when my foot missed, I know that I was a goner, but I didn't know where I was going to land.*

Q. Did you fall into this hole you have described?

A. Yes, sir, I fall right in that hole.

Q. Just a minute, Mr. Chamberlain, was there any light,—first I will ask you this,—what was the distance away, in the direction from which the train was coming, that you could first see the light of the train from the depot, about how many feet away?

A. Oh, it might be about three or four hundred yards to where the platform is now, coming kind of around where it strikes this depot,—the flash—

Q. Just a minute. That is to say, there is a curve—

A. There is a curve.

Q. And the distance is what from the curve to the platform?

A. Just about three hundred yards, I suppose; maybe two or three hundred yards, or six hundred feet or nine hundred feet; I don't know just what it could be.

Q. Was there any light came from the train about the time you fell, and, if so, describe that.

A. *Yes. The train was just about making this curve when I stopped to go around this trunk, and a kind of a flash struck me in the face, but I don't know—I will say—*

MR. KORTE: Of course, Your Honor, I want to object to the light; there is no charge of negligence on the ground that the light blinded him, or that these trunks were there. The only charge of negligence is that there was no railing maintained at this particular platform.

THE COURT: This will be one of the circumstances, is all. Go ahead, you say the light struck you.

A. *Yes, the light struck me and kind of blinded me a*

little bit, and I went to go around. There was neither a guard to protect me or nobody else, and—

Q. Just a minute. Was there any light about the depot, any light that you saw there?

A. No, there is no light of any kind there, outside of the locomotive light.

Q. Is there any light about the depot building or grounds which would in any way light up the platform or this hole or the edge of the platform in any way?

A. No light of any kind, unless a person would come, the trains would be late, and away after night they might bring a lantern to flag the train, is all.

Q. Was there any guard or barrier or any protection of any sort about the edge of this platform next to the hole?

A. No protection, no guard of any kind at that time.

Q. What was the condition of the night, as to being dark or otherwise?

A. Well, being as the train was late, I should judge from the best I know, that train was late, and it was getting dark, it was pretty dark, but how dark of course I wouldn't say. It was a dark night.

Q. At the time the train pulled in what was the condition of the night then?

A. A dark night.

(Page 77)

Q. These boxes and the trunks were the LaBranchs, that they had put there? They were going away, they were going to Salem, Oregon, their old home, weren't they?

A. Yes.

Q. You know that, don't you?

A. Yes, sir.

Q. They were going away for good?

A. Sure. I don't know whether they were going away for good, but—

GREENWOOD;

(Pages 156-157).

A. He was sitting on the trunk when I first noticed him, having words with Frank La Branch.

Q. How near did you go to him then when you heard these words?

A. I didn't come very much nearer. I was thirty feet from him.

Q. Go ahead and tell what happened there when you came up to where he and La Branch were having the words.

A. I come up to within maybe ten feet of him, and the train was coming about half way between the tunnel—

Q. How far is the tunnel from the platform?

A. It is about I should say three-quarters of a mile, a little over three-quarters of a mile. The train was coming near, and I expected my father from Marble Creek on the train, and so I picked up and come down, and I was about ten feet maybe from the trunk, and I turned around, but the head-light had not yet struck the trunk, and I seen Mr. Chamberlain get up, and I would say that he was under the influence of liquor.

Q. How did he act? Just tell the jury, when he got up, just describe how he got up.

A. He was sitting on the trunk, with his back east, facing west.

Q. Which way would that be with reference to where he fell off?

A. It was like if he was sitting on the trunk here, with his back to the headlight, he went cater-cornered and fell off.

Q. How did he act when he got up, with reference to movement?

A. Well, he seemed to be, well, just shaking a little, trembling, like, and he moved sort of sideways, and I seen Mr. Frank La Branch put out his hand. I don't know whether—it was too dark for me to say whether he touched him or hit him, or didn't touch him at all,—and I seen Mr. Chamberlain raise his hands, and then he fell over.

PLAINTIFF'S KNOWLEDGE OF CONDITION OF PLATFORM.

CHAMBERLAIN;

(Pages 62-65)

Q. How many times did you ever get on that train and slow it down, as you say, after you were hurt?

A. How many times?

Q. Yes, sir.

A. Oh, I don't know. I used to go down maybe, when I would be home, I would be running short of medicine, or such as that, and I would go down maybe once a week or such a matter.

Q. How many times before you were hurt did you ever slow that train down and get on?

A. Not only slow down; they would stop.

Q. How many times did that train ever stop for you before you were hurt?

A. Every time I want to go some place, but how many times I never kept track.

Q. Well, give us an idea, Mr. Chamberlain.

A. Every time I travel, but of course I can't say how often, how many tickets.

Q. Did you ever take that train there at that platform after the building was taken away?

A. Yes, sir.

Q. How many times did you take it? How many times did you go there to take it?

A. *I must have been there maybe twenty-five or more times.*

Q. Before you were hurt?

A. Before I was hurt. *I had been living there for ever so long.*

Q. I mean now from the time the building was taken away down to the time you fell off that platform, how many times do you claim you stopped the train there and got on?

A. After they moved the depot, I don't think hardly I took the train there more than a few times.

Q. About how many?

A. Maybe two or three different times.

Q. Were you there when the building was moved away?

A. Yes, sir.

Q. You were there on that day, when you saw them moving it?

A. *I didn't say I was there, but I could see right from my home.*

Q. Did you help them load the building on the car?

A. No, sir.

Q. It was loaded onto a car, was it not, and taken to Marble Creek?

A. Yes, it was loaded on a flat car.

Q. And the train that you would take and did take before you were hurt was this No. 17, going west, and due there about five-five or five-three?

A. Yes, due there at five-two.

Q. Now, before you were hurt, and after the building was taken away, can you tell me any place you went to on that train?

A. That I went to?

Q. Yes, sir.

A. I have took the train once for Spokane.

Q. Yes. Then where? Any other time?

A. I don't know where—I might have went, took the train to St. Maries for all I know, and I don't remember—

Q. Did you go east at all?

A. *I might have took the train to go up to Marble to get the mail.*

Q. *That is where you had to get your mail?*

A. *Yes.*

Q. *And get your groceries?*

A. *Yes.*

Q. *And get what you needed for the house?*

A. *Yes, sir.*

Q. Now, this morning when you were hurt, what were you doing there when you got there?

A. The morning I was hurt?

Q. Yes,—where were you in the morning?

A. I was right within maybe two or three hundred yards from where I fell, from the depot.

Q. Were you at your ranch there in the morning, or that night, before you were hurt?

A. I was there the night before, yes.

(Page 80).

Q. *Well, then, you say they never had any railing about this platform since they moved the building away, is that right; they never had put a railing on there from the time they moved the building away until you were hurt?*

A. *No, sir, never had.*

Q. *They never had a railing there?*

A. *Never had a railing.*

Q. *How do you know they never had any railing there?*

A. *I know because I travel often enough right across from my place.*

Q. *You knew that very well, didn't you?*

A. *I knew it.*

If the company had caused some one to go to Chamberlain that evening on his arrival at Herrick Station and tell him that there was no rail along the farther side of the platform from the track and that he must be careful and on the lookout, he could then certainly not have recovered for falling off after such warning. But such a warning would have been a useless thing for the reason the plaintiff testified repeatedly that he

knew when he went on the platform that no rail or guard was maintained, and had known of the condition at all times, and had seen it the morning and afternoon of the accident. The query arises; If a man, knowing a danger and its exact location, can deliberately and without any excuse or impelling cause walk into it and receive an injury and then recover damages therefor?

PLAINTIFF HAD BEEN DRINKING.

CHAMBERLAIN;

(Pages 68-70).

Q. And you had a drink of whiskey when you were there?

A. Oh, well, the boys—I met the boys and they offer me a drink.

Q. How many drinks did you have, Bart, before you started west?

A. I don't think hardly that I had any more than one or such a matter.

Q. And you had a bottle with you?

A. I had no bottle. The boys that invited me to drink, they had a bottle.

Q. How many bottles did you punish before you left?

A. All I seen was a four-bit flask.

Q. How many of you patronized that flask?

A. There might have been five or six.

Q. A pretty good sized flask?

A. A flask.

Q. What do you mean by flask?

A. A four-bit flask, a full pint flask.

Q. And you drank that before you left, with the others?

A. I drank maybe a drink out of it.

Q. You said you had two or three drinks, didn't you?

A. I said I drank one out of it that I know.

Q. Aren't you sure that you took more than one?

A. Oh, well, I might have —

Q. And then you started to go west at what time?

A. Well, I wouldn't say. It must have been about half past one or two, maybe.

Q. And who had this whiskey in the flask?

A. Oh, well, now, I don't know. You know—you meet so many, you know, you don't know who have it; they call you to take a drink, and you don't know who owns that liquor, and I don't know.

HODGES;

(Pages 118-119)

Q. Tell the jury what you saw by way of drinking whiskey, if there was any drunk there, by Chamberlain or the others that he was with.

A. Not right in the Marble Creek Store there, no, sir.

Q. Anywhere about Marble Creek before you started away.

A. Yes, along down toward the right of way I saw a bottle passed around several times among these gentlemen.

Q. Tell the jury whether or not you saw Chamberlain drink from the bottle.

A. Yes, I did.

Q. How often, about.

A. Oh, I can't say; several times.

(Pages 121-122)

A. What they had to drink was some kind of whiskey, I should judge.

Q. What was it in?

A. It was in a flask. I don't know whether it was a pint or a half pint flask.

Q. What did they do with it?

A. They were passing it around and each taking a drink, that is, all except one man.

Q. Who was that, that didn't take a drink?

A. I didn't see him take a drink every time. That was Mr. McDowell.

Q. Did you see Chamberlain take a drink?

A. Yes, sir.

Q. How often?

A. I can't swear to the number of times. I don't know that he refused any time.

ERNSTER;

(Pages 137-138)

Q. Where you saw him around those other men at Marble Creek from 11 o'clock on, tell the jury whether or not you saw Chamberlain drinking whiskey and the other men drinking whiskey with him.

A. Yes, sir.

Q. Tell in your own way what you saw, so that we can get an idea of it, too, what it is to drink whiskey.

A. I seen Chamberlain take a drink as he passed my car on their way walking down the track west. * * * *

Q. And where did you come upon them?

A. Just a short ways west of Marble Creek.

Q. Now tell the jury just how you came upon them there.

A. Well, they were all walking down the track, and they were all staggering, and they flagged us down and wanted to know if we would carry them down to Herrick, and I thought it best to do so on account of their drunken condition.

VERDICT IS RESULT OF PREJUDICE, BIAS, PASSION, OR OTHER
IMPROPER MOTIVE.

The verdict in this case *does not and cannot rest on the evidence in the case* but must of necessity rest on the *prejudice and bias of the jury*. It is a verdict founded and returned on *some other basis than the evidence given by the witnesses*.

In any possible light in which the evidence may be viewed the verdict in the case is so palpably excessive and unreasonable as to conclusively establish *either prejudice and bias in the minds of the jurors, or such a misapprehension of the facts proven and the instructions given as would amount to prejudice or passion resulting in a gross disregard of their duties as jurors*.

In either view of the matter a new trial should be granted.

The plaintiff had a life expectancy of only ten years,—if injured half so badly as this verdict would indicate, he could not humanly hope to live out his expectancy. He shows *no loss whatever of earning power,—not a word can be found in the record to the effect that he cannot do his gardening as well now as before the accident*, he runs his boat across the river and through the rapids as well. He had not been work-

ing for wages or a salary of any kind,—no complaint is made that he cannot do as much work now as he could do before the accident and the same kind of work he was doing before.

In the face of these facts the jury allow him a sum that if placed at interest at the legal rate in Idaho, (7 per cent) would earn him annually Five Hundred and Twenty Five Dollars, or Forty Three and 75-100 Dollars per month and leave the principal intact at his death.

But since he has no family to provide for, he might use both principal and interest and if he would so apportion it, to use up the entire sum in the same amount each year during his life expectancy of ten years, keeping the principal for the succeeding years at interest until the year in which it would be needed and expended, he would have *One Thousand Twelve and 50-100 Dollars to spend each year or Eighty Four and 39-100 Dollars per month.* This sum must be paid to a *man taken from no business or industry and whose earning capacity (barring increased age) is as great today as it was the day he fell from the defendant's platform.*

In order that this court may readily examine *all the evidence* there is in the case concerning plaintiff's injury, its nature and extent, and his loss of wages, salary or earning power, we are quoting herein the whole of the evidence given on that subject or bearing thereon.

We are so thoroughly impressed with the soundness of our position and the insufficiency of this evidence that we present it here in full so that plaintiff's counsel may answer us in their written brief so that we may know in advance of

the oral argument upon what grounds or theory they would support this verdict.

PLAINTIFF'S BUSINESS AND EMPLOYMENT.

CHAMBERLAIN;

(Page 58)

Q. And what farming do you do on it?

A. Raising garden and hay.

Q. How much hay do you raise?

A. Oh, I got maybe last year, cut about thirteen or fourteen tons.

Q. Where do you sell that hay?

A. Usually sell it right there at home, or feed it out.

Q. Did you sell any of it this year, or last year, last fall or this spring?

A. Sold it all.

Q. How did you get it across the river?

A. Fed it right there at home.

Q. I asked you whether you sold some.

A. Sold it all. They bought it, you know, to feed their own stock right on the place.

Q. On the place where you live?

A. Yes, sir.

PLAINTIFF SUFFERED NO PERMANENT INJURY AND HIS EARNING POWERS WERE IN NO RESPECT IMPAIRED.

CHAMBERLAIN;

(Pages 54-55)

Q. During the time you were in the hospital, Mr. Chamberlain, what was your trouble? How did you feel?

A. When I first—when I was gone—after I come to it

was nothing but pain, and it seemed that my side here was just about to drop to pieces, and the shoulder and the arm which it was that I couldn't move, almost paralyzed, and I felt when I could move it was just like taking knives and running it through my lungs and all through this side; that is the way I felt.

Q. Did you spit up at all?

A. Yes, and I begun to cough and spit, this inflamed blood and so on, and I spit,—the doctor say to me that it was hard for me; he says he can't see where in the world that phlegm and blood and so on comes from. I was spitting there for a week or such a matter a cuspidor like that full twice or three times a day.

Q. Was that blood or what was that you spit up?

A. Blood and phlegm and so on, so that it must show there was something in me to suffer.

Q. What is your condition now, Mr. Chamberlain? What is your condition at this time?

A. Well, I feel pretty—excepting this shoulder, right in the shoulder I can't very well handle it; I can handle it down, but I can't very well use that; and there is a pain, sharp pain, through my lungs when I take a long breath; it is just the same as running needles or knives through me; and right back in my shoulder, in the shoulder blade, there is a pain there that if I walk any distance there is a kind of burning pain, just as though something has been broke or disconnected, to this day.

Q. Do you have any trouble with your shoulder in damp or cold weather?

A. Yes, I notice it a little more at the time, just about raining or such a matter.

Q. What is your condition then?

A. Oh, it is just like running needles, and pain and so on, through this side.

Q. What is the condition of your lungs when you exercise to any extent or move about rapidly?

A. My wind is short; it has never come back.

Q. Is there any soreness or pain in your chest at those times?

A. Yes, when I take a long breath I feel a pain right in my lungs.

(Pages 59-62)

MR KORTE: Q. Did you bring any hay across the river yourself this spring for Higgins or any other man?

A. Yes, I brought it for Higgins.

Q. Did you bring it across the river?

A. Yes, but—

Q. How did you get it across?

A. In a boat.

Q. In this boat that you say you poled across?

A. Yes.

Q. How many bales would you have in that boat at a time?

A. I didn't have no bale; I would just bundle it up and take whatever the boat would hold.

Q. And then you would pole it across the river?

A. It is mostly paddling from down below, where I get the hay from.

Q. Did you have to paddle your boat up the river then to come across to where you were going?

A. Yes.

Q. How many trips did you make there to get that hay across.

A. I might have made about two or three trips.

Q. That is swift water there, isn't it, in the St. Joe?

A. Kind of slack water there. It is a long ways between the riffles there; it ain't all swift, you know.

Q. You said you had to pole your boat across instead of paddling, in your direct examination, isn't that so?

A. From my home to the depot, I had to come through swift water, but to where I took the hay, I could almost paddle back and forth.

Q. But when you come from your home over to this little station, when you want to take the train, you have to pole your boat through the swift water?

A. I have to pole the swift water, rapids.

Q. How many times a week would you make that trip?

A. Where?

Q. From your house to the station.

A. Oh, well, if I have nothing to do I might go maybe once a day, and in the summer when I am doing nothing I might go for the mail, and go and get a paper off of the train, or such a matter, maybe once, maybe twice a day,—I don't know.

Q. How often have you gotten a paper off of the train down to date, since you were hurt?

A. Since I am hurt?

Q. Yes, how many times did you ever get a paper off of the train?

A. Well, there was for a long time there I used to get a paper, when I was at home, I used to get a paper nearly every day at the time I was home.

Q. So you would cross that river twice a day then by poling.

A. It was in the winter, and you could walk; it was cold.

Q. I am talking about when you had to use the boat.

A. I never used the boat much after I got hurt; there was ice.

Q. This spring did you ever get any papers off of the train, in the spring?

A. This spring, of course, after the ice went away, I would pole up a ways and get a paper.

Q. I want to know how many times you ever got a paper off of the Milwaukee train this spring after the ice went out?

A. I might have got it maybe a dozen times or more.

(Pages 81-82)

MR. CORKERY: Q. Mr. Chamberlain, why did you have to pole across the river there to make the train? Why was it necessary to pole to make the train?

A. At the time that I had to pole?

Q. Why did you have to pole? Why couldn't you paddle?

A. Well, it is swift water, swift water from my place until you get a certain distance, to where I land, and I have to use a pike pole.

Q. How long a pole is that?

A. Oh, that might be ten or twelve feet long.

Q. And you stick that down on the bottom of the river?

A. Yes, and push on that.

Q. What would happen if you paddled across there at that point?

A. You can't very well paddle in swift water.

Q. What would happen if you would attempt to paddle?

A. You would be drifting down and couldn't make no headway.

Q. How far beyond the depot would you land?

A. Just almost across.

Q. But I say if you paddled and didn't use your pole, where would you land at?

A. Oh, you might land away down below.

GREENWOOD;

(Pages 154-155)

Q. How did he get back and forth across the river?

A. In a boat.

Q. How would he operate the boat?

A. You have to take a pike pole.

Q. That is, take a pike pole and pole your boat across the river?

A. Yes.

Q. On account of what,—swift water?

A. Swift water.

Q. Have you seen him poling back and forth since he was hurt?

A. Not from that place, but I have seen him pole the swifter rapids below that place.

Q. Swifter rapids?

A. Yes, sir, directly across from the bridge.

Q. When you speak of the rapids tell the jury what it was.

A. Swift water, running over the rocks.

DR. PLATT;

(Pages 97-100)

A. Well, he had a dislocated right shoulder, and some fractured ribs, and skinned up and bruised up about the head and shoulders and arms.

Q. Just take the shoulder there. Was there any breaking of bones about the shoulder?

A. I think the joint was broken where the bone was dislocated.

Q. State his general condition as to strength or weakness when you examined him, and general bodily vitality.

A. Well, of course, you couldn't tell very much about that. He was pretty sick and more or less delirious at that time.

Q. How long did that delirious condition remain?

A. About six or seven days.

Q. And state how many ribs were involved in the fracture or breaking.

A. As near as I could make out, there was three fractured ribs, two of them in front and one back.

Q. Were any of these three ribs broken in more than one place, or fractured in more than one place?

A. I think not.

Q. Just take each rib, if you can, and tell where the fracture or break was.

A. The sixth and seventh ribs were fractured in front, at what they call the cartilagenous attachment, and the eighth rib was fractured posteriorly.

Q. Now, Doctor, was there any pressure by those broken ribs upon the lungs, in your opinion?

A. Yes, sir, I think there was at the time.

Q. What did that pressure result in?

A. It resulted in the development of pneumonia in a few days.

Q. Anything else?

A. The pneumonia was followed by an abscess of the lung.

Q. State how you know there was an abscess there.

A. About the sixth or seventh day he was there the abscess ruptured into the bronchial tubes and he spit up the pus.

Q. Can you tell the jury,—on those sixth and seventh days, you say it was one of those two different days?

A. It started on the sixth or seventh day; I don't remember just which.

Q. How long did it continue?

A. He was spitting up pus more or less during all the time he was in the hospital. It wasn't entirely cleared up when he left.

Q. During those first two days after it broke, how much pus would you say he spit up during those first two days?

A. I should say at least a quart or a little more.

Q. All together or at several times?

A. Several times.

Q. Just take in two days, how much would you say he spit up?

A. I should judge a quart or a quart and a half.

Q. On each day?

A. That is the entire amount for the first two or three days?

Q. Was this spitting continuous or did it come all of a sudden?

A. Well, it would stop at intervals, and then come quite an amount at a time.

Q. At the first was there any blood in this corrupt matter that was spit out?

A. Well, he spit bloody sputum before this abscess ruptured. *There was no blood mixed with the pus.*

Q. State whether his condition was serious or not serious at the time you examined him.

A. It was pretty serious at that time.

Q. How serious?

A. Well, I didn't think there was a chance of him getting well.

(Pages 103-104).

Q. Isn't the man in a fine physical condition for a man of his age at this time, Doctor?

A. He has got a good shoulder for the injury he received at the time.

Q. That is, the broken part you spoke of?

A. Yes, but he has less mobility of the shoulder joint at the present time.

Q. He could get his arm up over the head, could he not?

A. Yes, but not easily.

Q. Didn't he take his shirt off and show the mobility of the shoulder?

A. He took it mostly off with his left arm though.

DR. MCCARTHY:

(Pages 164-166).

A. Well, I made an examination of Mr. Chamberlain in the presence of Dr. Platt, at his room in the hotel here, and I stripped him and examined him, his general physical condition. His eyes, and his chest, and his heart, and lungs, and abdomen, and his nervous system, reflexes, his joints, all except the urinary examination; I didn't examine the kidneys, which Dr. Platt tells me are normal. For a man of his years he is remarkably well preserved. I could find no evidence of any present injury to him. Dr. Platt tells me he had a dislocation of his right shoulder. If he had, the present movements are normal. He can move his shoulder; he took off his shirt and lifted his arms up, in clothing himself, and he did it unconsciously, before I drew his attention to the fact that he had complained of some trouble with his shoulder. There is no crepitation. There is no evidence of any present injury to it. If he did have a dislocation he is entirely recovered from it at this time.

Q. How did you find his lungs, Doctor?

A. In regard to his chest, his lungs, his expansion, or deep breathing, he has got good expansion, three and a half

inches, for a man of his years, which is remarkable; and when he takes a long breath the extent to which the lung descends down is an inch and a half on each side. I marked it out with an indelible pencil on the body, and they are both equal, on the right and left side. I understand he had pneumonia of the right lower lobe. If he had, he is completely recovered. There is no evidence of any adhesion and no crepitation, nothing at the present time that I can discover, and his heart is excellent, his arteries are good; they are as good as in a man of forty. His reflexes are good, and I see no reason why the man isn't in very good, perfect condition for a man of his age. He is much better than most men are at fifty.

CROSS EXAMINATION;

BY MR. CORKERY:

Q. For a man of his age then you say he is in perfect condition?

A. For a man of his age he is excellent.

Q. There is no evidence, absolutely no evidence of this injury?

A. Not that I can discover.

Q. You heard Dr. Platt describe the adhesions there, did you, state that there were adhesions there now?

A. Well, I heard Dr. Platt say, but I tried to demonstrate it with Dr. Platt today, *and I can demonstrate it on him now if you will permit me to.*

SPECIFICATION OF ERROR III AND IV.

Where it is apparent to reasonable men that the verdict of a jury is founded in whole or in part upon prejudice, bias, passion, sympathy, or *something other than the evidence in the*

case, a sense of fair dealing and evenhanded justice ought to impel the court to grant a new trial. How can the court in such a case say, or have reason to believe, that a verdict *in any sum whatever* would have been returned against the losing party *had the improper motive* been absent from the minds of the jurors? How can the court say an *unprejudiced and unbiased* jury would not have said *in this case that the defendant* was not guilty of negligence or that the plaintiff was guilty of carelessness or contributory negligence or assumed the risk with full knowledge of the danger? We insist that the record utterly fails to disclose any liability whatever on the part of the defendant in this case, but if we are wrong in that belief then we think it beyond cavil or debate that there is *grave doubt* as to our liability and abundant room for *reasonable, unbiased and unprejudiced minds to differ* as to defendant's liability.

The only basis in the way of evidence of any kind the jury had for estimating and fixing damages was the amount paid out (\$150.00) for attendance of a physician and hospital charges, and the pain which plaintiff suffered at the time.

Based upon the standards which have been fixed generally by courts, this could not have, *at the utmost limit*, reasonably exceeded one thousand dollars. But instead of that the jury says \$7,500, or *more than seven times any reasonable sum for the injury and suffering proven*.

The court should bear in mind in this case that *physical pain is the only suffering* plaintiff has sustained and that there has been and can be no mental anguish or suffering in this case for the reason that the injury *in no way maims or*

disfigures the plaintiff and he is *in no respect permanently injured*. If plaintiff had made a case entitling him to recover at all he has only shown damage in the amount of his doctor and hospital fees and the *actual physical pain* he suffered, and the evidence shows that he was out of the hospital in *three or four weeks* after the accident occurred. (Trans. p. 53) The record discloses that this was not the kind of an injury which would cause *protracted or excruciating pain* and certainly not such that a court or jury would be justified in awarding *damages mounting up into the thousands* for.

We make no contention that the trial court has not the power to require a successful litigant to remit a part of a verdict; *but what we do contend for* in this case is that the amount of the verdict is *so disproportionate* to the amount of *loss, injury or damage suffered* as to *instantly* shock a just, fair-minded man's sense of justice and fairness, and at once suggest the thought of *prejudice, passion, bias* or some *unfair and improper motive* having influenced the minds of the jurors.

We call the court's attention to the decision of some of the courts bearing on this phase of our contention, and most respectfully submit that the reasoning appeals strongly to one's sense of right and fairness in the administration of justice.

It should be remembered in the very outset of our discussion on this branch of the case that the Idaho Statute Sec. 4439 R. C. provides that a new trial may be granted "for any of the following causes:

* * * * *

Subd. 5. Excessive damages appearing to have been given under the influence of passion or prejudice."

The statute is identical with the statutes of some of the states from which we shall hereafter cite cases, and especially Montana and Colorado.

In *Southern Pacific Co. v. Fitchett* (Ariz.), 80 Pac. 359, Fitchett recovered \$1000 for injured feelings due to an insult to him by the conductor of the company's train. The trial court denied a new trial providing the plaintiff remitted \$600. This was done and the railroad company appealed. The judgment was reversed and a new trial was ordered. The court said:

"In the case at bar the trial court was of the opinion that more than half of the damages awarded for the appellee's 'injured feelings' were excessive. It was impossible to tell how the jury made up their verdict, but it was evidently not the result of cool and dispassionate consideration. Under these circumstances, we think it was not the province of the court to substitute its own estimate of the damages for that which it had rejected, but that the question of the proper sum to be awarded was one of fact, which should have been submitted to the determination of another jury. We are the more readily led to this view when we consider that the language of our Code is that 'in all cases, both at law and in equity, either party shall have the right to submit all issues of fact to a jury.' Paragraph 1389, Id. Whatever may be the effect of this provision as to equity cases, it was the manifest intention of the Legislature to enact as strongly as words could express its will in favor of the right to have questions of fact left to the determination of the jury.

Other errors are assigned by the appellant, but, as the case will have to be reversed because of the action of the court with respect to the remittitur, and the other questions presented may not arise upon another trial, we deem it unnecessary to discuss them.

The judgment and order appealed from will be reversed, and the cause remanded to the district court for a new trial."

In *Chenoweth v. Great Northern Railway Co.* (Mont. 1915), 148 Pac. 330, plaintiff had been injured and recovered

a \$25,000 verdict. Upon motion for a new trial the court made a conditional order for reduction of the verdict to \$15,000. On appeal the judgment was reversed and a new trial was ordered. The court said:

“It is insisted that the damages are excessive and appear to have been awarded under the influence of passion or prejudice, and with this we agree. Of necessity, there cannot be any hard and fast rule established for determining the maximum compensation to be allowed for a personal injury, and the courts are therefore ever reluctant to interfere. But, while the amount of recovery in the first instance is committed to the wise discretion and unbiased judgment of the jurors, the Codes have provided for a review by the trial and appellate courts. Section 6794 specifies seven grounds, for any one or more of which a new trial may be had. The fifth is: ‘Excessive damages, appearing to have been given under the influence of passion or prejudice.’ In addition to the remedy by new trial, there is available to the defeated party the right to insist that the amount of the verdict be reduced by the court. This principle has become so firmly established in the jurisprudence of our country that it may well be said to be a part of the American common law. It is a serious question whether a court should ever resort to this latter remedy, except in a case where the amount of the excess can be accounted for by resort to mathematical calculation, based upon some error in the standard adopted by the jury. If the amount of the excess cannot be ascertained by some rational method other than the mere *ipse dixit* of the court a new trial should be granted, for under our judicial system the rights of parties are submitted to the fair and impartial judgment of jurors, not to their passions or prejudices. Whenever it becomes apparent that either or both of these impulses influenced the amount of a verdict, it is the duty of the court to see that a tribunal created to secure justice is not perverted from its purpose and made an implement of oppression.

The object of section 6794 is to secure to litigants fair and impartial trials of their controversies. The statute is silent with respect to the means by which passion or prejudice may be shown. The courts have gen-

erally contented themselves with a comparison of the amount of the particular verdict with the extent of the injuries shown. The jurors are not permitted to impeach their verdict by disclosing the proceedings in the jury room, from which passion or prejudice might be inferred; (State v. Beesskoven, 34 Mont. 41, 85 Pac. 376) and unless the amount of the verdict, when taken into consideration with the surrounding facts and circumstances ordinarily available to the defeated party, discloses the presence of these elements, then subdivision 5 of Section 6794 is a dead letter. * * * *

If, then, passion and prejudice swayed the jurors, there was not a fair and impartial trial, and instead of reducing the verdict, the lower court should have granted appellant's motion to the end that the case may be once submitted to the unbiased judgment of jurors selected to administer justice between these parties."

In *Benge's Adm'r v. Fouts*, 174 S. W. 510, the court said:

"It has been repeatedly held by this court that a new trial will be granted because of excessive damages when they appear to be so great as to strike the mind at first blush as having been superinduced by passion or prejudice," and cites numerous cases.

In *Belt R. C. v. Charters*, 123 Ill. App. 322, the court said:

"We, however, believe that no case can be found in which a judgment, based upon a remittitur, although approved by the trial judge, has been allowed to stand where the reviewing tribunal is satisfied from the record that the verdict rendered was based upon passion or prejudice, or was founded upon a misconception of the evidence. *In such a case the infirmity pervades the entire verdict*, and the remission of the one-half or of any other part of the whole amount *does not free the remaining part from the taint*. The courts will not take money or other property from one and give it to another, except upon a *fair trial in accordance with the forms of law*."

In *Gulf, etc. R. Co. v. Coon*, 69 Tex. 730, 7 S. W. 492, in a suit for personal injury to a passenger, the court said:

"The trial judge concluded that it was excessive,

as he required plaintiff to enter a remittitur of three thousand dollars as a condition to his overruling the motion for a new trial. If the judge was of the opinion the verdict was excessive, he should have granted a new trial. The damages are assessed by the jury; if the verdict is excessive, the judge, in actions like this, had no measure by which to determine how much it is excessive; his attempt to do so is an invasion of the rights of the jury. His only course in such a case is to grant a new trial."

In this case the trial court recognized that the verdict had been made up *at least in part* through *prejudice or passion, or sympathy, or some misapprehension of either the facts or the instructions of the court*, and so the court says in his order on petition for a new trial:

"After argument by the respective counsel and the court being fully advised in the premises, it is now ordered that the defendant's petition for a new trial be, and the same is, hereby granted unless the plaintiff elects within ten (10) days from this date to accept a reduction of said judgment in the sum of two thousand five hundred (\$2,500.00) dollars, together with the interest accrued on that sum from the date of verdict, and to accept judgment in the sum of five thousand (\$5,000.00) dollars, and to waive said excess, then and thereupon said petition for a new trial shall be denied."

Under such circumstances the court ought to grant a *new trial* unless the court can say *beyond a doubt that the evidence is so convincing and conclusive that a reasonable, fair jury could not have returned a verdict in favor of defendant and that had they done so such a verdict would have been set aside by the court.*

In *Tunnell Mining Co. v. Cooper* (Col.), 115 Pac. 901, Ann. Cas. 1912 C 504, the court said:

"Where the verdict was confessedly so flagrantly excessive, as the remittitur admits it to have been in this

case, *it must be ascribed to prejudice, partiality, passion, or some undue or improper influence or cause, perverting the judgment of the jury*; and to permit any part of it to stand would not be consistent with the preservation of the impartiality, integrity and purity of the trial by jury. * * * * Upon a full consideration of the whole record, and a searching analysis of the entire transaction, the court reached the conclusion that the amount of the verdict alone furnished evidence that it must have been reached through the influence of passion or prejudice.”

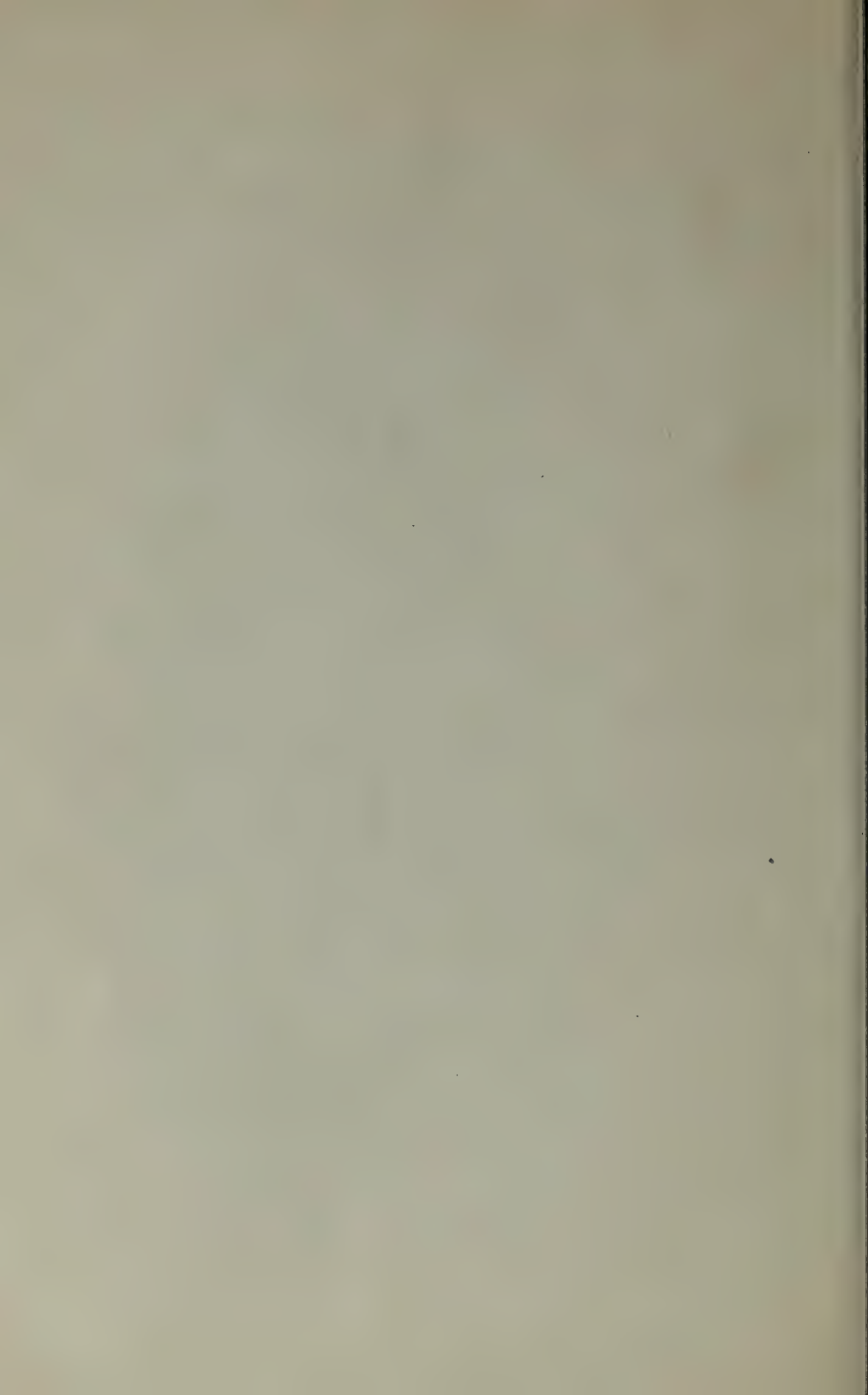
At page 509, Ann. Cas. 1912 C, the annotators state the rule as follows:

“The general rule is, though there is authority to the contrary, that where an excessive verdict has been rendered through passion or prejudice the error cannot be cured by remittitur, but the defendant is entitled to a new trial as a matter of right.”

In the case of *DeCelles v. Casey*, (1914) 139 Pac. 586, Chief Justice Brantley, speaking for the Supreme Court of Montana said:

“That the verdict was excessive because given under the influence of the passion and prejudice of the jury, however, is clear. The amount to be awarded in this class of cases is lodged in the discretion of the jury; but this discretion is not unlimited or to be exercised arbitrarily. It will not do to say that the jury are free to make the measure of punishment whatever they choose, without any just or reasonable relation to the wrong done.

No definite rule can be declared as to when the court should interfere and when it should not; yet, since a new trial may be ordered when it appears that the jury have acted under the influence of passion and prejudice (Rev. Codes, Sec. 6794), it follows that, when the award is so large that it cannot be accounted for on any other theory and is wholly out of proportion to the wrong done and the cause of it, the conclusion is irresistible that it was measured by the passion and prejudice of the jury, rather than by an estimate made in the exercise of their discretion, and it becomes the duty of the court to set it aside. So far as a general rule on the subject can be



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Plaintiff in Error,

vs.

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Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

*Upon Writ of Error to United States District
Court for the District of Idaho, Northern
Division.*

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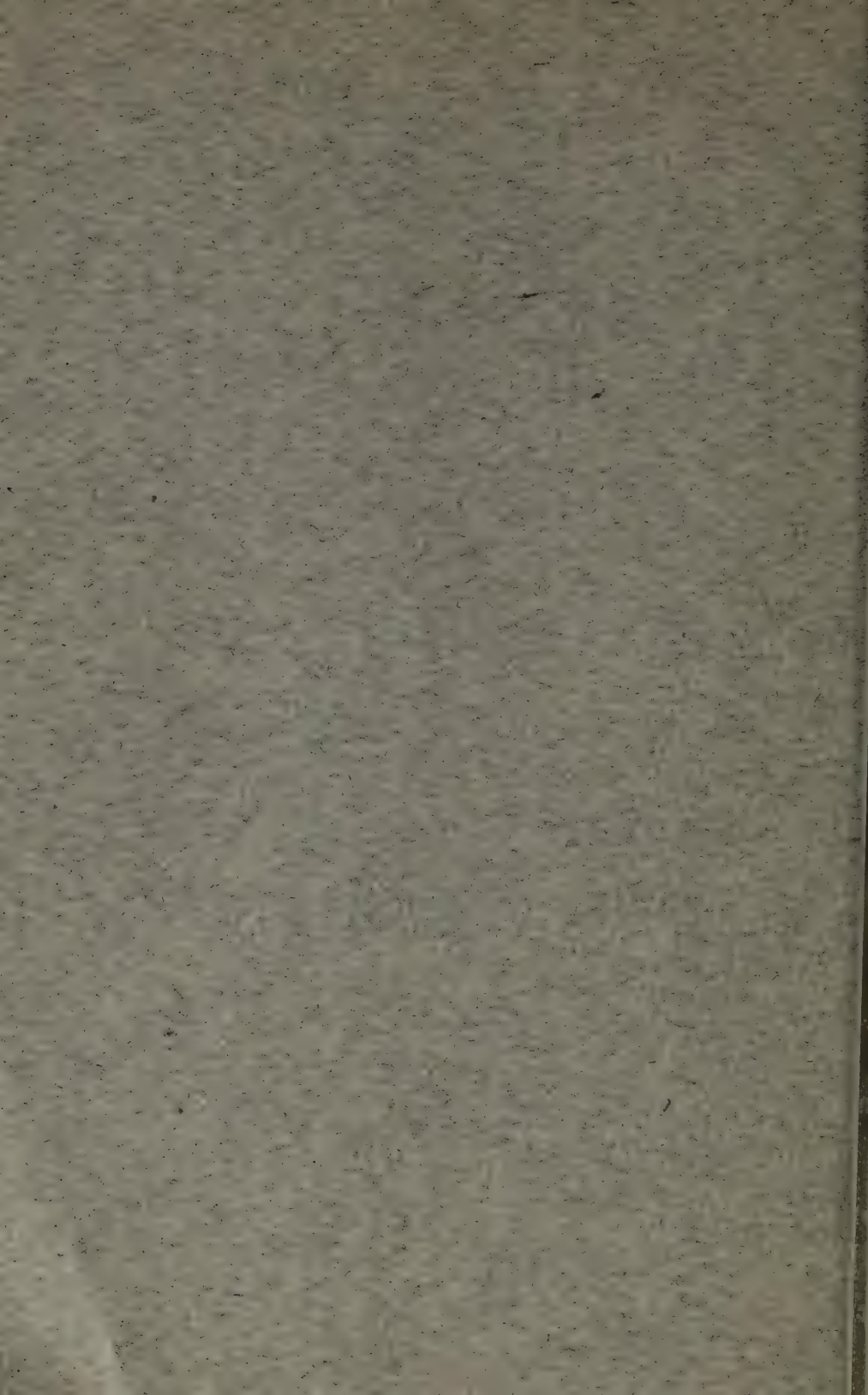
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STATEMENT

(We will refer to the parties as plaintiff and defendant.)

We will restate the case since the defendant has taken the most favorable view that could be placed upon its own testimony, disregarding the plaintiff's witnesses entirely.

This writ of error is taken from the verdict of the jury and judgment in favor of the plaintiff in the sum of Five Thousand Dollars for personal injuries. The verdict was originally Seven Thousand Five Hundred Dollars, and reduced by the trial court upon argument of a petition for new trial.

The plaintiff was a pioneer homesteader having a little farm on the St. Joe River about a half mile from the defendant's station of Herrick. This station was maintained as a regular stop with depot building, platform, etc., but a short time before the accident the defendant had loaded the depot building onto cars and moved it to some other point upon its line. The building and platform had been built up on posts over a large depression, so that the platform and depot building were about ten feet above the ground. Before its removal, the depot building fitted close up against the platform, making an effective guard or barrier along the back side of the platform. The platform was about eleven feet wide and eighty feet long. The removal of the depot building left an open hole

from ten feet to thirteen feet deep along side of the platform, for a distance of forty feet, so that if a person walking along the platform took a misstep, he would fall into an abyss ten to thirteen feet deep. No railing, guard, barrier, or protection of any sort was erected along the edge of this platform after the removal of the depot, nor was the platform in any manner lighted at night.

The station was still maintained as a regular stop, tickets being sold from other points of the line reading to Herrick and passengers being allowed to take the train at said point and pay cash fare. All the passenger trans discharged and took passengers, and it was maintained as a regular stop without flag.

On the day of the accident, the plaintiff left his farm, went up to a station of Marble Creek to purchase some groceries, and on his return trip, was picked up by two signal maintainers, operating a motor speeder, who had been making a practice of carrying passengers for hire, and upon the plaintiff and others paying a certain fare, was carried on down to Herrick, where he poled across the river in a boat to his farm, and got ready to go on down to Plummer, several stations west, on the evening passenger train. The train was considerably late, and arrived at Herrick after dark. No light of any kind was maintained about the depot platform or grounds and the night was very dark, the place being shadowed by hills, a distance back

from the track.

The train being a couple of hours late, plaintiff waited a short distance away from the depot until he heard the train coming. After the train pulled around a curve, the intense light of the headlight struck the plaintiff in the eyes, blinding him, and in attempting to walk up to the passenger coach, he stumbled over a trunk left on the platform and fell over the edge into the hole, striking on a stump at the bottom. The plaintiff lay unconscious for a period of time but was afterwards picked up, after having been exposed to the cold (it being about the middle of November) was carried into a nearby house, and later taken to the St. Maries hospital, where he was found to be suffering from a broken shoulder, three of his ribs were fractured, from which in a few days, a severe case of pneumonia set in, plaintiff remaining under the care of a doctor until about the time of the trial.

ARGUMENT

This case is very simple. The negligence charged in the complaint was not denied at the trial. It is not contended by the defendant that the platform was railed or guarded or that it was lighted. Neither is it contended that a guard or light was unnecessary. The defendant's argument amounts to this: 1. Plaintiff knew that the depot building had been moved, and that the hole was unguarded. 2. That *certain witnesses for the defendant testi-*

fied that he was intoxicated. 3. That the verdict is still excessive, notwithstanding its reduction by the trial court.

Before citing our authorities, and taking up the assignments of error as set out in defendant's Brief, we shall briefly show the fallacy of each of these three positions.

1.

It is true that plaintiff knew in a general way of the conditions at the platform and station, and knew of the removal of the depot building. However, before the accident, he had no such minute knowledge of the conditions about the platform as he displayed at the trial. A very violent assumption is made in the defendant's Brief by crediting the plaintiff with a knowledge of the length, breadth, and minute description of the platform, and assuming that he had all this knowledge in advance of the accident. Of course, all this was learned after he had been hurt, in order that he might testify. Skillful avoidance is also made in the defendant's Brief of the fact that this accident occurred in the dead of night. Had the plaintiff walked out on this platform in the light of day, serious doubt might be entertained of his right to recover, but on an unlighted platform, his attention distracted by the blinding light of the locomotive, the bustle and excitement naturally attendant upon the arrival of a transcontinental train, *makes an entirely different case*. In addition, a trunk had

been left in his way, and of which he was not aware, so that any general knowledge of the condition was as effectively erased from his mind as if it had never been there. A very patent effort has been made to quote from the defendant's own witnesses and place the most favorable construction possible upon their testimony, when, of course, the jury has found the facts to be in accordance with the plaintiff's theory.

2.

Similary, great stress is laid upon the evidence of two employees of the defendant who testified that the plaintiff was intoxicated. The plaintiff and at least three other witnesses testified that the plaintiff was sober. While there was a sharp conflict upon this point in the evidence, it was a question for the jury, which has been resolved in favor of the plaintiff, and is not subject to review by the appellate court.

3.

The third contention is likewise not subject to review by the appellate court. The rule that has been repeatedly adhered to by this court and the Supreme court of the United States is that the *discretion* of the *trial court* in passing upon the *amount of the verdict* is not *subject to review*.

SPECIFICATION OF ERROR I.

The plaintiff's statement that he intended to board the train, made on the platform just as the train was arriving, and before the accident (p. 87,

88) and without any knowledge that he was going to be hurt, was properly admitted. Such declarations are weighed to determine if they are made with any design or motive, and if they appear to be involuntary, they become a part of the happenings themselves, and are proper evidence.

In an Ohio case *Railway Co. vs. Herrick*, 49 Ohio State, 25, 29 NE 1052, the statement of an intending passenger that he was "going to Collins" made at his home, before going to the depot, was offered to show intention to become a passenger, and the court held it should have been admitted:

"Was his declaration that he was 'going to Collins' competent evidence of that fact? That depends whether the declaration was contemporaneous with, and explanatory of, the act of departure. One departing from home may have in view any conceivable place, or any conceivable purpose, as his destination or object. The act of departure is thus in itself of the most ambiguous character; it does not afford the slightest cue to the object of the journey; it is natural and usual—according to the common experience of mankind—that the party should say something respecting his departure, of an explanatory character. Declaration thus made are a part of the act itself."

The rule is stated in 6 *Thompson Negligence* 674:

"The evidence offered must not have the earmarks of a device, or after-thought, nor be merely narrative of a transaction which is really and substantially past. The rule will allow proof of declarations uttered before the happening of the accident if connected with and a part of the transaction—as, for example,

a declaration of an intention to become a passenger made by one injured at a railway station."

In *Denver Co. vs. Spencer*, 52 Pacific 211, the statement of the deceased that he was to meet a person at the train made several days previous to the accident, was admitted where the court quoted Horton on Evidence, with reference to such statements:

"Their sole distinguishing feature is that they must be the automatic and necessary incidents of the litigated act, necessary in this sense; that they are part of the immediate preparation for, or emanations of, such act, and are not produced by the calculated policy of the actors."

Baltimore Railway Co. vs. State, 32 Atlantic 201. Deceased conversation admitted in evidence consisted in statements made to friends just before boarding the train that he was going to Washington. The court said:

"Such declarations of the decedent, made at the very moment of time immediately preceding the act of the defendant Company, by which he lost his life * * * and was properly admissible."

See also *Chicago Railway Co. vs. Chancellor*, 46 Northeastern 269.

SPECIFICATIONS OF ERROR II.

The testimony with reference to the two employees operating the speeder, accepting money for the transportation of the plaintiff on his trip down from Marble Creek, was admitted in rebuttal.

The signal maintainers had already testified that they encountered the plaintiff and others in a drunken condition (p. 138), and that for the purpose of their own protection to save them from injury on the railway right of way, they carried them on the speeder. To overcome the theory that the plaintiff was intoxicated, and to show that no such motive prompted these employees of the Company, it was proper to allow the plaintiff's witnesses to testify to the real reason for their being carried. The plaintiff and his witnesses testified that they were carried not for any humanitarian reason, but were simply carried for money. The purpose for which they were carried thus became very material. While the fact that they were picked up without any payment of money would tend to corroborate the defendant's theory that the plaintiff was intoxicated; on the hand, if they were carried as a commercial proposition for money, it would tend to corroborate the plaintiff's theory that he was sober. It was for this purpose that the testimony was admitted. (See pages 172 to 174.)

SPECIFICATION OF ERROR III.

THE STATION WAS A REGULAR STOP TO DISCHARGE AND TAKE ON PASSENGERS.

The plaintiff *Chamberlain* testified concerning the station, as follows:

Q. After the depot was moved what did the Company do with reference to maintaining that as a station?

A. They take on passengers, selling tickets, just the same as they did before.

Q. What trains made stops there after they took the depot and about the time you got hurt, on November 15, last year?

Well, I didn't understand that.

Q. I say what trains made stops there?

A. It is the one that goes up in the morning at 10:22, which we called that 18.

Q. That is a passenger train?

A. That is a passenger. And in the evening the same, we call that 17, going toward Spokane, at 5:02, supposed to be; it used to be.

Q. I will ask you whether or not the Company continued to sell tickets from other points on their line to that point?

A. They sold tickets, and I think, I actually believe they are selling right to this day, because it ain't more than a week or so that I got a ticket right from St. Maries to Herrick myself; it ain't more than a week or so.

Q. What is the fact as to whether or not passengers are picked up there from day to day, and were picked up at about the time you were hurt, by the Company?

A. Well, they were taking passengers with the flags.

Q. And did they do that from day to day?

A. Well, I don't know whether they would do it today, but if you are on the platform they will stop or slow down, and another thing I will say, I was on the platform when another man came, and there was nobody got on and nobody got off; there was a man that wanted to take the train that evening, and asked me whether, if they have to flag this train. And I said, "He is the conductor there; ask him,

there at the door." The conductor replied to him, and he says, "No, we stop here, and we have no order to discontinue this place or go by, *we stop whether passengers or no passengers*". I hear the conductor say that myself. (pp. 44 and 45.)

....*William Kirkpatrick*, the agent for the defendant Company at Marble Creek, an adjoining station, testified with reference to the maintenance of a station:

Q. But they still continued to take on passengers and discharge passengers after they removed the depot?

A. Yes, sir.

Q. And sold tickets to that point?

A. We did, yes, sir. p. 170 and 171.)

There is a division of authority with reference to the duty a railroad company owes an intending passenger. No distinction is made in some cases between a passenger about to board a train and one actually upon a train, the rule of the highest degree of care being applied in each case. However, the court in the present case instructed the jury that the defendant owed the plaintiff the duty of ordinary care in maintaining its platform, and we are willing to abide by that rule in this case.

THE FAILURE TO GUARD AND LIGHT
THE PLATFORM WAS THE EXERCISE OF
NO CARE AT ALL.

The plaintiff *Chamberlain* testified as follows:

Q. Was there any light about the depot, any light that you saw there?

A. No, there is no light of any kind there, outside of the locomotive light.

Q. Is there any light about the depot building or grounds which would in any way light up the platform or this hole or the edge of the platform in any way?

A. No light of any kind, unless a person would come, the trains would be late, and away after night they might bring a lanter to flag the train, is all.

Q. Was there any guard or barrier or any protection of any sort about the edge of this platform next to the hole?

A. No protection, no guard of any kind at that time.

Q. What was the condition of the night, as to being dark or otherwise?

A. Well, being as the train was late, I should judge, from the best I know, that the train was late, and it was getting dark,— it was pretty dark, but how dark, of course, I wouldn't say. It was a dark night.

Q. At the time the train pulled in what was the condition of the night then?

A. A dark night.

Q. Is there anything about that country there that makes it dark?

A. On account of being so deep among the mountains, of course, it will be naturally darker than it would be on a level, in open country.

AUTHORITIES ON LIABILITY

In *Chesapeake Railway Co. vs. Honley*, 159 S. W. 1147, it was contended that the depot being in a thinly populated country where a little business was done, obviated the necessity of light and guard rails. The back of the platform was five or six

feet from the ground, but without rails around the outer edge. No agent was maintained at the depot, and the court said:

“We cannot say as a matter of law that an unlighted platform which is used after dark for the accommodation of passengers, and which is not protected by guard rails or in any other manner is reasonably safe, even if the station is located in a thinly populated part of the country, and the amount of the business done at that point is very little. The question was for jury” * * *

It must be remembered, however, that the platform in question was *both unguarded and unlighted*. Had it been guarded, then doubtless no light would have been required, but on the other hand if it had not been sufficiently lighted, guard rails would have been necessary. While ordinarily it may not be the duty of a railroad company to maintain a light at a station such as this at the arrival and departure of trains, yet where the evidence shows that the platform provided is of such character so as not to be reasonably safe unless lighted, whether or not a light should be maintained so as to render the platform reasonably safe, is, under the circumstances, a question for the jury.”

Edwards vs. Union Pacific, 133 Pac. 728, the negligence charged was the failure to construct the depot so as to leave space for passengers to pass along the platform to the trains. It was contended that the company could not be compelled to construct the platform according to any particular plan but the court held the test to be whether the platform was reasonably safe, saying:

“It was likewise for the jury to say whether or not the defendant had used due care in the construction and maintenance of its station platform.”

In *Van Cleef vs. City of Chicago*, 130 American State Reports, 275, 23 L. R. A., (ns) 636, where the plaintiff was pushed from a platform on account of the lack of any railing, the duty of ordinary care was held to apply.

In a decision of this court, *Puget Sound Electric Ry. vs. Harrigan*, 176 Fed. 488 (ninth circuit) the defendant was negligent in failing to construct a platform of sufficient length at a point where cars were switched on a wye and no sufficient light was maintained.

In *Lancaster vs. Southern Ry.*, 92 S. C. 177, negligence was charged in failing to furnish a foot stool or to have the place of alighting from trains sufficiently lighted, and recovery was permitted to stand.

In *Cook vs. St. Louis Ry.*, 179 S. W. 501, an intending passenger was injured at a flag station where no agent was maintained, and recovery was had.

See also

Cullen vs. West Jersey Ry. Co., 85 N. J. L. 708; 90 At. 283;

Kelly vs. Boston Ry. Co., 96 N. E. 1031;

Bacon vs. Hudson, 139 N. Y. Supp. 740; 83 At. 176;

Leuteritz vs. Ice Co., 82 N. J. L. 251;

Benenson vs. Swift N Co., 127 Minn. 432;

149 N. W. 668.

INJURY OCCURRED AT NIGHT

The chief argument of defendant's Brief is that plaintiff knew of the removal of the depot building. However, as we have already pointed out, the plaintiff was blinded by the headlight of the locomotive.

The plaintiff Chamberlain testified:

Q. Was there any light came from the train about the time you fell, and if so, describe that.

A. Yes. The train was just about making this curve when I stopped to go around this trunk, and a kind of flash struck me in the face, but I don't know—I will say—

A. Yes, the light struck me and kind of blinded me a little bit, and I went to go around. There was neither a guard to protect me or nobody else, and—

The night was particularly dark. The large headlight of a modern locomotive is sufficient to throw a powerful light which would effectively prevent the plaintiff from becoming aware of his real peril. The primary cause of the accident was failure to sufficiently guard and light the platform. The trunk, which the plaintiff was not shown by the record to have any previous knowledge of, was a circumstance distracting the plaintiff's mind.

In *Edwards vs. the Union Pacific Railway Company*, supra, negligence was charged in the construction of a depot platform. It was claimed that plaintiff was familiar with the conditions:

“Her testimony was that she knew it was dangerous there between the post and the track

and that if she had seen or realized her situation she would not have stood so near."

The court in discussing an instruction given in that case, said:

"It fails to take into consideration the conditions and circumstances in which the plaintiff was placed, the presence of a crowd of persons between her and the narrow space in front of the window, the confusion which ordinarily occurs at such times, and the natural inclination of persons who are situated as the plaintiff was, to concentrate their faculties upon efforts to secure a favorable position from which to board the cars. After all, the question is, can reasonable minds differ? If from the evidence it can be said that reasonable minds might differ, the question is for the jury."

In *Puget Sound Electric Railway Company vs. Harrigan*, the brakeman was generally familiar with the conditions of the platform, which however, had been extended a short distance and to just what extent the plaintiff did not know. This court in passing upon a question of contributory negligence, said:

"While the question whether there should have been an instructed verdict on the ground of the plaintiff's contributory negligence is not free from doubt, we are not convinced, in view of the evidence, that there was error in submitting the question to the jury. The plaintiff was unfamiliar with the place at which the switching was to be done. He knew that the platform had been extended, but he did not know to what point it had been extended. The defendant did not furnish a fixed light suffi-

cient to light up the south end of the platform. It furnished the plaintiff a lanter which, as the evidence tends to show, was not adequate to light up the premises. It had placed alongside its track a plank which was there for no explained purpose, and which was likely to deceive. In view of all the circumstances, we are not prepared to say, as a matter of law, that the plaintiff, in descending from the car as he did, with the light which he had, and in stepping upon the apparent platform beneath him, was guilty of contributory negligence such as to preclude him from recovering damages."

No claim has ever been made that the conditions of the headlight and trunk were negligence. They were causes which served to prevent the plaintiff from realizing his dangerous situation, and effectively eliminated any previous knowledge of the condition of the platform from his mind. There was ample testimony that the plaintiff was sober at the time he attempted to take the train.

Q. Mr. Chamberlain, I will ask you, at the time you attempted to take the train there, and fell from the platform, what was your condition as to being sober or otherwise?

A. I was sober, which I am a sober man. (p. 82.)

The fact that he was familiar with every detail of the questions asked by the defendant in a searching cross-examination, concerning his trip from Marble Creek, refutes the charge of intoxication. Plaintiff poled the river twice, over rapids and swift water to get home and change his clothes

after his ride on the speeder with the signal maintainers. He walked a quarter of a mile up the track just before taking the train, to talk with a man named Robinson. He is corroborated by the testimony of Frank LaBranch, Charles McDowell, and John A. Glover, who all testified that he was sober. (p. 87-107,178.) The defendant quotes from certain of its own witnesses, without in any way indicating that they are the defendant's witnesses, to make it appear that the testimony showed intoxication and entirely ignore the plaintiff's case on this point. This question has been determined by the jury contrary to the testimony of the defendant's witnesses.

SPECIFICATIONS OF ERROR IV

We contend that the appellate court will not review the trial court's discretion in passing upon motion for new trial, and the verdict as to amount of recovery, and will hereinafter cite authorities upon that question. However, out of abundant caution, we shall discuss the defendant's argument upon that point. No commission of disinterested, reputable physicians was appointed by the court or requested by the defendant to examine the plaintiff. The only evidence as to the plaintiff's condition presented by the defendant was the testimony of Dr. McCarthy, the *regularly retained surgeon and physician of the defendant*. He had never treated the plaintiff before, and in fact, had never seen him before the day of the trial. He made a

hasty examination in a few minutes of time, during a recess of court, testifying, as follows:

Q. You don't agree with Dr. Platt in his statement?

A. No, I don't.

Q. How long did you take in this examination?

A. About an hour.

Q. With this man down here?

A. Yes.

Q. What time did you get through that, Doctor?

A. I think we got through at twenty minutes to 1.

Q. With the patient?

Q. How many times did you see him?

A. Just once.

Q. And you left his hotel at twenty minutes to 1?

A. Yes.

Q. And what time did you start in?

A. Started in just as soon as we got through here.

Q. And we left here a little after 12, did we?

A. Just about 12.

Q. During those few minutes was the only time you ever saw that man in your life?

A. Yes.

Q. And you never treated him?

A. No.

Q. And this judgment is derived from those few minutes you examined him?

A. Yes. (Page 166.)

The plaintiff had been under care of *Dr. Platt* from the time of the accident up until the time of trial, who testified that his injuries were permanent:

Q. Now go on and state whether or not this condition is permanent, as to the shoulder?

A. What?

Q. Is the injury to the shoulder which you described there a permanent injury or not?

A. Yes.

Q. You mean by that what,—that it is permanent?

A. Yes, sir.

Q. What would you say his present condition is as to his lung?

A. Well, as a result of that pneumonia and that abscess in the lung, there was more or less adhesions formed between the pleura and the lung, that are permanent.

Q. Now I will ask, you, taking into consideration the facts, that he fell this distance of ten or fifteen feet from this platform, together with your first examination, and your subsequent attendance upon him, and the facts you learned there, and taking into consideration his present condition, as you have described it, will this condition in all reasonable probability continue to be permanent as to the lung?

A. Yes, sir.

THE APPELLATE COURT WILL ONLY CONSIDER ERROR APPARENT ON THE FACE OF THE RECORD.

This court and the Supreme Court of the United States have repeatedly held that they have no authority to review the discretion of the trial court in granting or denying a motion for new trial, and that the office of such motion is directed solely to the trial court.

In *Arkansas Valley Land Co. vs. Mann*, 103 U. S. 69, it was contended, after the trial court had di-

rected a remission of the verdict, that the very act of the court in doing so, showed that the verdict was the result of passion and prejudice. The Supreme Court of the United States said:

“But independently of this view, and however it was ascertained by the court that the verdict was too large by the above sum, the granting or refusing a new trial in a Circuit Court of the United States is not subject to review by this court * * *. Equally beyond our authority to review, upon a writ of error sued out by a party against whom a verdict is rendered, is an order overruling a motion for a new trial, after the plaintiff, with leave of the court, has remitted a part of the verdict. *Whether the verdict should be entirely set aside upon the ground that it was excessive, or was the result of prejudice, or of a reckless disregard of the evidence or of the instructions of the court, or whether the verdict should stand after being reduced to such amount as would relieve it of the imputation of being excessive, are questions addressed to the discretion of the court, and cannot be reviewed at the instance of the party in whose favor the reduction was made.* Under what circumstances, if any, a party who is compelled to remit a part of the verdict, in order to prevent a new trial, can complain before this court, we need not decide in the present case. *Parsons v. Bedford*, 28 U. S., 3 Pet. 433, 447 (7:732); *Mercantile Mut. Ins. Co. vs. Folsom*, 85 U. S. 18 Wall. 237, 248 (21:827, 832); *New York Cent. & H. R. R. Co. v. Fraloff*, 100 U. S. 24, 31 (25:531, 534.)

“If the Circuit Court had entered judgment for the whole amount of the verdict below, the defendant could have made no question in this court as to its being excessive. We could only,

in that case, have considered matters of law arising up on the face of the record. And we can do no more when the defendant brings to us a record, showing that the court below has, in the exercise of his discretion, compelled the opposite side, as a condition of its overruling a motion for a new trial, to remit a part of the verdict."

In *Wabash Railroad vs. McDaniels*, 101 U. S. 454, it was contended before the appellate court that the verdict was excessive.

Justice, Harlan, delivering the opinion of the court, said:

"That we are without authority to disturb the judgment, *upon the ground that the damages are excessive, cannot be doubted*. Whether the order overruling the motion for new trial based upon that ground, was erroneous or not, our power is restricted to the determination of questions of law arising upon the record." *R. R. Co v. Fraloff*, 100 U. S. 31 (XXV., 534.)

The Circuit Court of Appeals (ninth circuit) held in *Alexander vs. United States*, 57 Fed. 828.

"Upon the first point the law is well settled. The decisions of the circuit and district courts upon motion for a new trial are not reviewable. It is held that the motion for a new trial is designed only to invoke the judgment of the trial court upon the alleged errors set out in the motion, and that its office and function are limited to that court. *Doswell v. DeLaLanza*, 20 How. 29; *Railway Co. v. Struble*, 109 U. S. 381, 3 Sup. Ct. Rep. 270; *Missouri Pac. Ry. Co. v. Chicago & A. R. Co.*, 132 U. S. 191, 10 Sup. Ct. Rep. 65; *Ayers v. Watson*, 137 U. S. 584, 11 Sup. Ct. Rep. 201; *Fishburn v. Railway Co.*, 137 U. S. 60, 11 Sup. Ct. Rep. 8. *And the rule*

is applicable to the circuit court of appeals. Railway Co. v. Howard, 1. C. C. A. 229, 49 Fed. Rep. 206; McClellan v. Pyeatt, 1 C. C. A. 613, 50 Fed. Rep. 688.

Again in Campbell vs. Moran Bros., 97 Federal 477 (ninth circuit) this court said:

“The overruling of a motion for a new trial is not assignable as error, under the practice established in the court of the United States. Tthis has been repeatedly held by the Supreme Court and by the circuit court of appeals. Moore vs. U. S., 150 U. S. 57; 14 Sup. Ct. 26; Holder v. U. S., 150 U. S. 91, 14 Sup. C. T. 10; Blitz v. U. S., 153 U. S. 308, 14 Sup. Ct. 924; Wheeler v. U. S. 159 U. S. 523, 524, 16 Sup. Ct. 93; Sigafus v. Porter, 51 U. S. App. 693, 28 C. C. A., 443, 84 Fed. 430; Railway Co. v. Charles, 7 U. S. App. 359, 2 C. C. A. 380, 51 Fed. 562.”

No complaint has been made of any instruction, no exception thereto being taken. There is no error on the face of the record and the judgment should be affirmed.

Respectfully submitted,

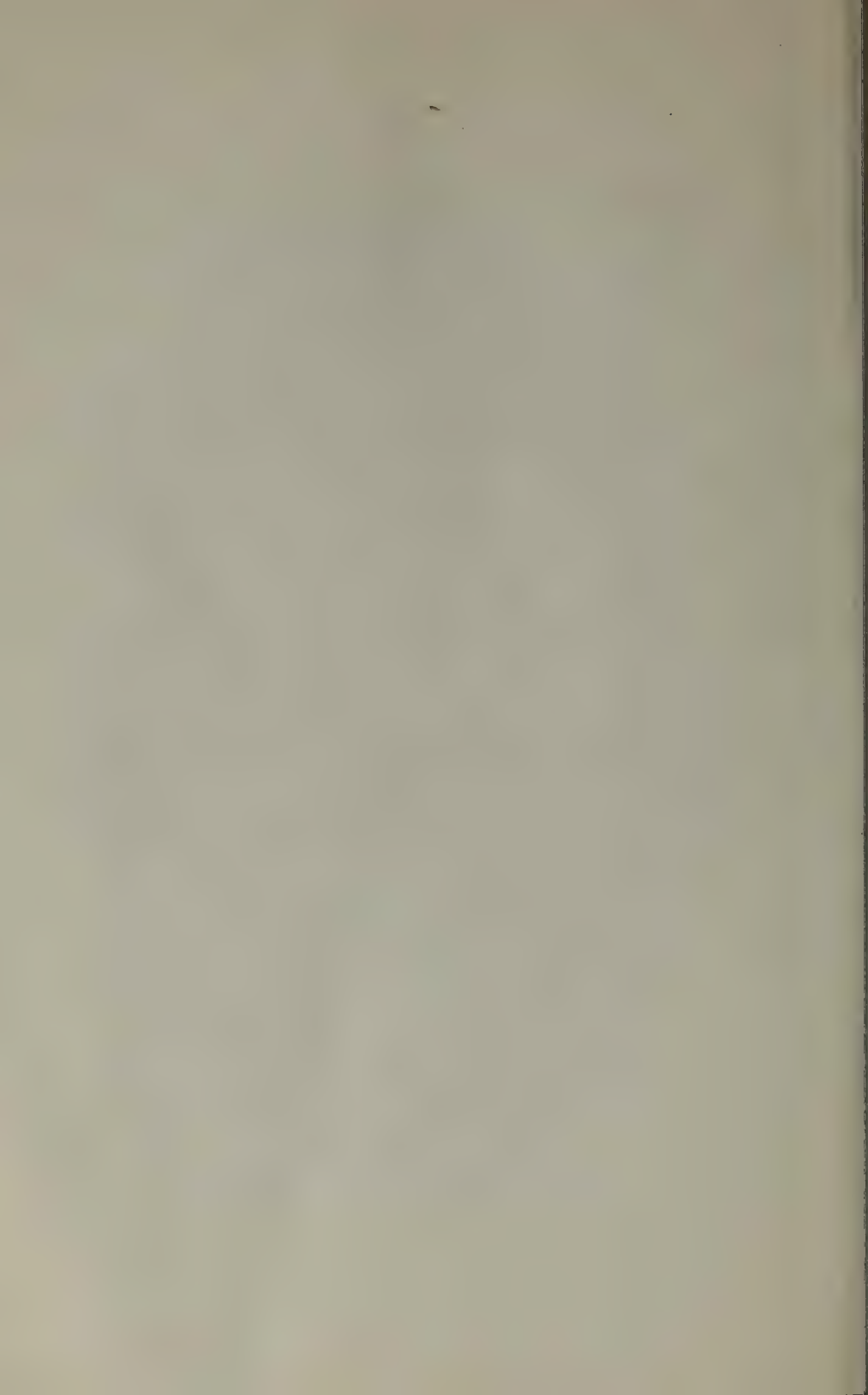
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No. 3099

United States
Circuit Court of Appeals
For the Ninth Circuit.

MELEANA KALEHUA,

Plaintiff in Error,

VS.

HENRY CLARK,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Supreme Court of the
Territory of Hawaii.

FILED

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CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

MELEANA KALEHUA,

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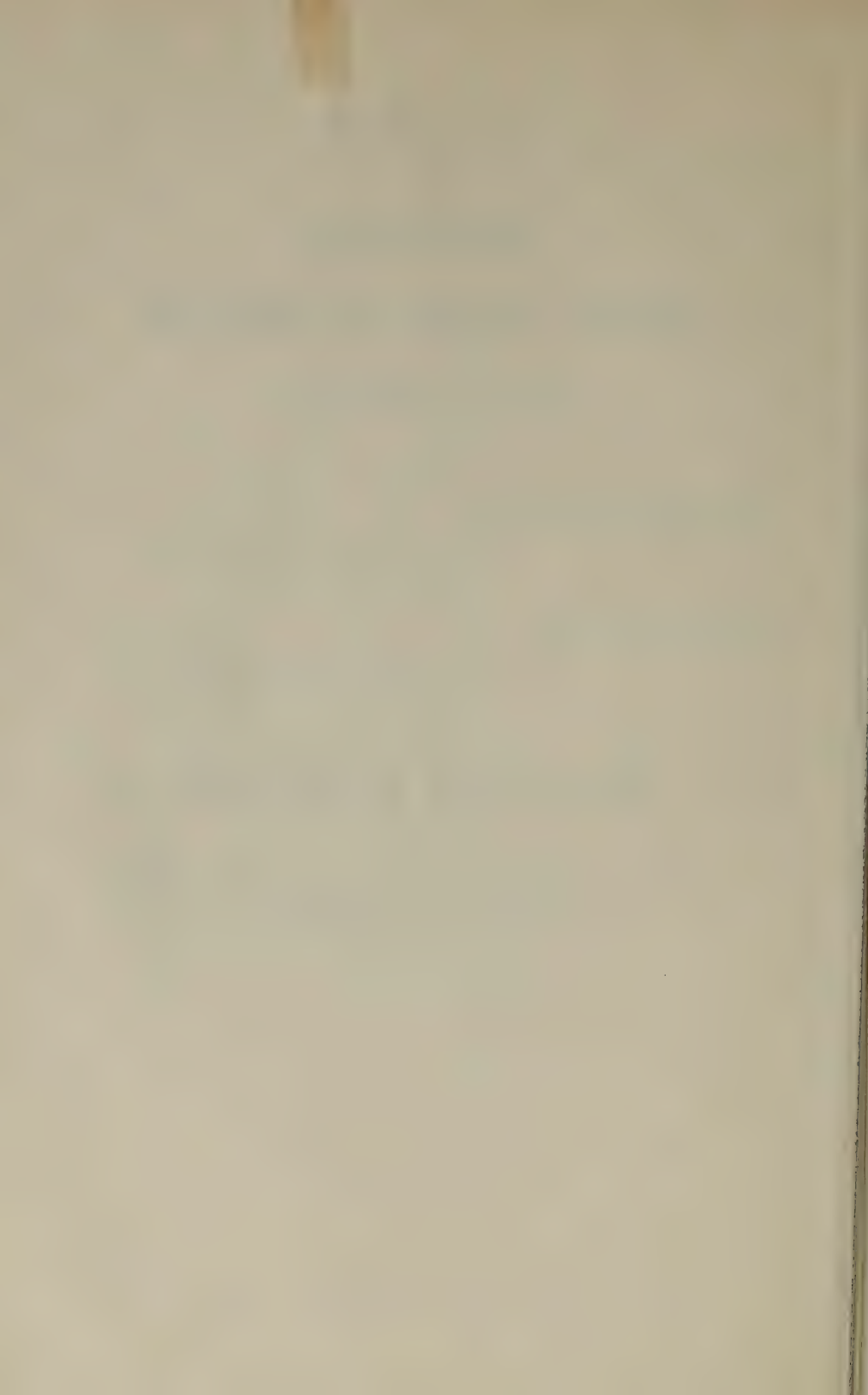
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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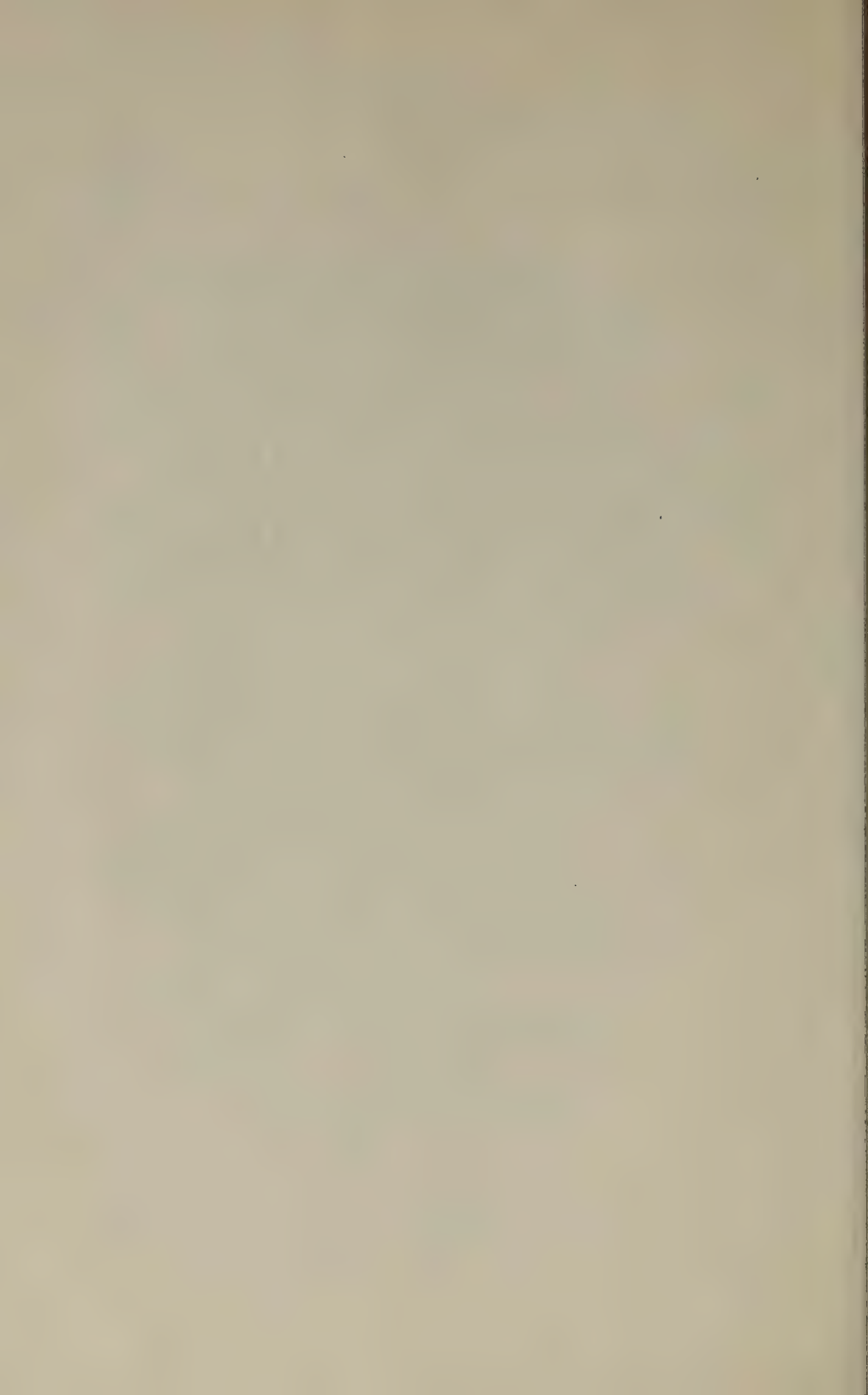
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In the Supreme Court of the Territory of Hawaii.

JANUARY TERM, MARCH SESSION 1917.

(Stamped \$2.00.)

MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

Petition for Writ of Error.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the Territory of Hawaii:

The petition of Meleana Kalehua, the plaintiff in error above named, respectfully shows to this Honorable Court, as follows, to wit:

That heretofore on or about the 21st day of September, 1916, the plaintiff in error brought her action against Henry Clark, defendant in error, in the Circuit Court of the first Judicial Circuit, Territory of Hawaii, to quiet the title to certain lands situate in the Island of Oahu, Territory of Hawaii.

That thereafter and on, to wit, the 15th day of February, 1917, said cause came on regularly and duly for trial in said Circuit Court before the Honorable C. W. Ashford, First Judge of the Circuit Court of the First Judicial Circuit, sitting without a jury; that after hearing the evidence adduced on behalf of both parties hereto, said court granted judgment to defendant in error, together with the costs of the action; that six months have not elapsed

since the said judgment was rendered, entered and recorded; that said judgment is unpaid and has not been satisfied either in whole or in part; that plaintiff in error feels aggrieved by said [1*] judgment and says that in the proceedings prior to judgment and during the trial and at the trial and by the judgment of the court, many errors were committed by the said Circuit Court to the prejudice of the plaintiff in error, an assignment whereof is herewith presented and filed and she asks and prays that the proceedings in said cause, as shown by the record, pleadings, minutes of the clerk, exhibits, stipulations and the evidence recorded by the official stenographer of said court be inquired into and reviewed by this Honorable Court in connection with this petition.

Wherefore, your petitioner prays that a writ of error may issue out of this court addressed to the clerk of the said Circuit Court, commanding him, the said clerk, to send up to this Honorable Court all and singular the record in said described action at law to the end that the errors existing in the record may be corrected, and petitioner further prays that said errors may be by this Honorable Court corrected, the said verdict set aside, the judgment reversed and a new trial ordered and that full and complete justice may be done in the premises.

*Page-number appearing at foot of page of original certified Transcript of Record.

Dated Honolulu, T. H., March 9, 1917.

MRS. MELEANA KALEHUA.

Plaintiff in Error.

ANDREWS & PITTMAN,

Attorneys for Plaintiff in Error. [2]

Territory of Hawaii,

City and County of Honolulu,—ss.

Meleana Kalehua, being first duly sworn, deposes and says: That she is the plaintiff in error herein; that she has read the foregoing petition and knows the contents thereof and that the same is true to the best of her knowledge and belief.

MRS. MELEANA KALEHUA.

Subscribed and sworn to before me, this 9th day of March, 1917.

[Seal]

MABEL A. DOANBURG,

Notary Public, First Judicial Circuit, Territory of Hawaii.

[Endorsed]: No. 1013. Recd. \$26.00. Filed March 15, 1917, at 10:50 A. M. J. A. Thompson, Clerk. [3]

In the Supreme Court of the Territory of Hawaii.

JANUARY TERM, MARCH SESSION 1917.

MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

Plaintiff's Assignment of Errors.

Now comes the plaintiff in error, Meleana Kalehua, by her attorneys, Andrews & Pittman, and assigns errors committed by the Circuit Court of the First Judicial Circuit, Territory of Hawaii, at the trial of the above-entitled cause in February, 1917, to the prejudice of plaintiff in error during the progress of the case and in the determination, and to which plaintiff duly excepted, as follows, to wit:

I.

The Court erred in deciding that the divorce of Emma H. N. Clark vs. Henry C. Clark, who it is admitted is the defendant in error, being Divorce No. 4304, was a good and valid divorce and that said Henry C. Clark was therefore, able to legally marry Alexandrina Leihulu and, by said marriage, was her sole heir at law.

II.

That the Court erred in rendering its decision against plaintiff in error and in favor of defendant in error, and further rendering judgment dismissing the complaint of the plaintiff in error and denying that she was the heir at law of Alexandrina [4] Leihulu and, for and on account of said errors assigned above, to all of which objection and exception was taken by the plaintiff in error, the plaintiff in error prays that all of the proceedings in said action be by this Honorable Court reviewed and that said judgment of the said Circuit Court be set aside and such orders be entered herein as to this Honorable Court may seem meet and proper.

Dated Honolulu, T. H., March 9, 1917.

MELEANA KALEHUA,
Plaintiff in Error,
By ANDREWS & PITTMAN,
Attorneys for Plaintiff in Error.

[Endorsed]: No. 1013. Filed March 15, 1917, at
10:50 A. M. J. A. Thompson, Clerk. [5]

In the Supreme Court of the Territory of Hawaii.

JANUARY TERM, MARCH SESSION 1917.
MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

Notice of Issuance of Writ of Error, etc.

To Henry Clark, Defendant in Error:

PLEASE TAKE NOTICE: That a writ of error has been issued in this cause upon the petition of the above-named plaintiff in error in connection with the foregoing assignments of error.

Dated Honolulu, T. H., March 15th, 1917.

ANDREWS & PITTMAN,
Attorneys for Plaintiff in Error.

[Endorsed]: Filed March 15, 1917, at 10:50 A. M., J. A. Thompson, Clerk. No. 1013. In the Supreme Court of the Territory of Hawaii. Meleana Kalehua, Plaintiff in Error, vs. Henry Clerk, Defendant in Error. Petition for Writ of Error, and Assignments of Error. Filed March 15, 1917, at

10:50 A. M. J. A. Thompson, Clerk. Andrews & Pittman, Attorneys for Plaintiff in Error. [6]

In the Supreme Court of the Territory of Hawaii.
(Stamped \$2.00.)

MELEANA KALEHUA,
Plaintiff and Plaintiff in Error,
vs.

HENRY CLARK,
Defendant and Defendant in Error.

Summons.

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or his Deputy; the Sheriff of the City and County of Honolulu or his Deputy:

You are commanded to summon Henry Clark, defendant in error, to appear before the Supreme Court of the Territory of Hawaii, within twenty (20) days after service hereof, to answer the annexed Petition for Writ of Error, Assignment of Errors and Notice of Meleana Kalehua, Plaintiff and Plaintiff in Error.

And have you then there this Writ with full return of your doings thereon.

WITNESS the Honorable Chief Justice of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 15th day of March, 1917.

[Seal]

J. A. THOMPSON,
Clerk. [7]

[Endorsed]: No. 1013. Supreme Court, Territory of Hawaii. Meleana Kalehua, Plaintiff and Plaintiff in Error, vs. Henry Clark, Defendant and Defendant in Error. Summons. Issued at 11:10 o'clock A. M., March 15, 1917, J. A. Thompson, Clerk. Received at 10:30 A. M., Mch. 16, A. D. 1917. P. Gleason, Deputy High Sheriff, Ent. Returned at 1:12 o'clock P. M., March 19, 1917. J. A. Thompson, Clerk.

Sheriff's Return to Summons.

Served the within Summons on Henry Clark, therein named as defendant in error, at Honolulu, city and county of Honolulu, Territory of Hawaii, this 16th day of March, A. D. 1917, by delivering to Carlos A. Long, the attorney in fact of said Henry Clark, defendant in Error, a certified copy hereof, and of the Petition for Writ of Error, Plaintiff's Assignment of Errors and Notice annexed hereto, and at the same time showing him the original.

Dated at Honolulu, city and county of Honolulu, Territory of Hawaii, this 16th day of March, A. D. 1917.

PATRICK GLEASON,
Deputy High Sheriff, Territory of Hawaii.

In the Supreme Court of the Territory of Hawaii.

JANUARY TERM, MARCH SESSION.

(Stamped \$1.00.)

MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

**Bond on Writ of Error Returnable in Supreme Court,
Territory of Hawaii.**

KNOW ALL MEN BY THESE PRESENTS:
That we, Meleana Kalehua, as principal, and Y. Ahin, as surety, are held and firmly bound unto J. A. Thompson, Esq., clerk of the Supreme Court of the Territory of Hawaii, and his successors in office, in the sum of Fifty Dollars (\$50), lawful money of the United States, to which payment, well and truly to be made, we do bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

THE CONDITION of this obligation is such that

WHEREAS, in an action at law heretofore pending in and before the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, wherein said bounden principal was plaintiff and Henry Clark was defendant, the said Circuit Court did, on the 15th day of February, 1917, order, render and enter a judgment of said Circuit Court, wherein and whereby judgment was rendered for the said defendant and against the plaintiff, adjudging

that plaintiff take nothing by reason of her said complaint and the said bounden obligor, as plaintiff in error, is about to sue out a Writ of Error from the said Circuit Court of the First Judicial [8] Circuit of the Territory of Hawaii to the Supreme Court of the Territory of Hawaii to the end that the judgment of the said Circuit Court in said cause above described may be reviewed by the said Supreme Court of the Territory of Hawaii, and has taken and is about to take such further and other proceedings as may be necessary to obtain a review of the said judgment by the said Supreme Court of the Territory of Hawaii;

NOW, THEREFORE, if the said bounden principal shall prosecute said Writ of Error to effect and shall answer all damages and costs, if she fails to make her plea good, or if she fails to make her said plea good and to obtain a reversal of the said judgment, the said bounden obligors will pay the said judgment in said original cause in case of failure to sustain the writ of error, then this obligation shall be void; otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said principal and the said surety have hereunto set their hands and seals at the City and County of Honolulu aforesaid, this 9th day of March, 1917.

MRS. MELEANA KALEHUA,

Principal.

Y. AHIN,

Surety.

Approved.

A. G. M. ROBERTSON,

Chief Justice.

[Endorsed]: No. 1013. In the Supreme Court of the Territory of Hawaii. Meleana Kalehua, Plaintiff in Error, vs. Henry Clark, Defendant in Error. Bond. Filed March 15, 1917, at 11:10 A. M. J. A. Thompson, Clerk. Andrews & Pittman, Attorneys for Plaintiff in Error. [9]

In the Supreme Court of the Territory of Hawaii.

(Stamped \$2.00.)

MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

**Writ of Error from Supreme Court, Territory of
Hawaii.**

The Territory of Hawaii: To Joseph K. Cullen, Esquire, Clerk Circuit Court, First Judicial Circuit:

Whereas, in an action lately pending before the Circuit Court of the First Circuit, in which Meleana Kalehua was plaintiff, and the said Henry Clark was defendant, error is alleged to have occurred as appears by the assignment of errors on file in this court, you are commanded forthwith to send up to this court the record and the exhibits filed in said proceedings,

WITNESS, the Hon. A. G. M. ROBERTSON,
Chief Justice of the Supreme Court, at Honolulu,

Territory of Hawaii, this 15th day of March, 1917.

[Seal]

J. A. THOMPSON,
Clerk Supreme Court.

Received the foregoing writ of error on this 15th day of March, A. D. 1917, at 11:25 o'clock A. M.

J. C. CULLEN,
Clerk Circuit Court, First Circuit.

Return to Writ of Error.

In obedience to the foregoing Writ of Error to me directed and in pursuance of the praecipe filed in the above-entitled cause, I herewith transmit to the Supreme Court of the Territory of Hawaii, the certified transcript of the Record in said cause, said record consisting of the papers and documents and exhibit more particularly set forth and enumerated in the certificate appended to said record.

Dated Honolulu, T. H., March 28th, 1917.

[Seal]

J. C. CULLEN,
Clerk, Circuit Court, First Circuit, Territory of
Hawaii. [10]

[Endorsed]: No. 1013. In the Supreme Court of the Territory of Hawaii. Meleana Kalehua, Plaintiff in Error, vs. Henry Clark, Defendant in Error. Writ of Error. Filed and Issued March 15, 1917, at 11:10 A. M. J. A. Thompson, Clerk. Returned March 28, 1917, at 11:15 A. M. Robert Parker, Jr., Assistant Clerk. [11]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

JANUARY TERM, A. D. 1916.

ACTION TO QUIET TITLE.—STAMPS \$2.00.
MELEANA KALEHUA,

Plaintiff,

vs.

HENRY CLARK,

Defendant.

Bill of Complaint.

Now comes the plaintiff, by her attorneys, Andrews & Pittman, and complaining of the defendant, alleges:

I.

That the plaintiff is entitled, in fee simple absolutely, to those certain pieces or parcels of land situated in the city and county of Honolulu, Territory of Hawaii, hereunder set out and described, to wit:

(a) All those certain pieces or parcels of land situate at Kamoku, Waikiki, city and county of Honolulu, Territory of Hawaii, described in R. P. No. 6875, L. C. A. No. 1412, to Malo, particularly bounded and described as follows:

APANA 1. Commencing at the west angle of Keaka's land and running:

N. 41° W. 1 chain 75 links along Kuluwailehua;
thence

N. 55° E. 1 chain 67 links along Keaweawe; thence

S. 42° E. 1 chain 61 links along Kahiaweawe;
thence

S. 51° W. 1 chain 72 links along Keaka to the point of commencement.

Area, .27 Acres. [12]

APANA 2. Commencing at South angle of lot and running:

N. $41\text{--}1\frac{1}{2}^{\circ}$ W. 4 chains 4 links along Kuluwailehua;
thence

N. 50° E. 1 chain 29 links along C. Kanaina;
thence

S. 41° E. 3 chains 87 links along the lands of
Kuluwailehua and Kaeina; thence

S. 43° W. 1 chain 26 links along lele of Waiaka.

Area, 0.49 acres.

(b) All that certain piece or parcel of land situate in Humu, Ili of Pukele, Palolo, City and County of Honolulu, Territory of Hawaii, described in R. P. No. 2539, L. C. A. No. 1912, to Malo, particularly bounded and described as follows:

APANA 1. Commencing at the South corner and running:

N. 58° W. 300 chains, or 198 feet, by the boundary of the Konohiki; thence

N. 49° E. 380 chains, or 250.8 feet, along the stream; thence

S. $49\text{--}1\frac{1}{2}^{\circ}$ E. 096 chains, or 634 feet, along the the stream; thence

S. 13° W. 353 chains, or 233 feet, along the boundary of the Konohiki to the place of commencement.

Area, .72 acres.

APANA 2. House lot in Pukele. Commencing at the North corner and running:

S. 25° W. 200 chains, or 132 feet, along the boundary of the land of Malo; thence
 S. 62° E. 200 chains, or 132 feet, along the stone fence; thence
 N. 25° E. 200 chains, or 132 feet, thence
 N. 62° W. 200 chains, or 132 feet, to the place of commencement.

Area, .40 acres.

(c) All that certain piece or parcel of land situate at Paleula, City and County of Honolulu, Territory of Hawaii, [13] described in L. C. A. 1090 to Kapena, particularly bounded and described as follows:

APANA 2. Beginning at the North corner mauka in Pauoa stream and running 3.91 chains, or 258 feet, along stream; thence

S. $31\text{--}1\frac{1}{2}^{\circ}$ E.

N. $58\text{--}1\frac{1}{2}^{\circ}$ E. 2.21 chains, or 146 feet, along Pehu; thence

N. $28\text{--}1\frac{1}{2}^{\circ}$ W. 0.82 chains, or 54 feet, along Umi to point of commencement.

Area, 686 square fathoms.

(d) All that certain piece or parcel of land situate at Kaliu, Honolulu, City and County of Honolulu, Territory of Hawaii, described in L. C. A. 1090 to Kapena, particularly bounded and described as follows:

APANA 1. Beginning at makai North corner of this Luai Kulani, and running:

S. $46\text{--}1\frac{1}{4}^{\circ}$ E. 2.51 chains along Lua Kulani; thence

S. $55\text{--}3\frac{1}{4}^{\circ}$ E. 1.78 chains along Lua Kulani; thence

N. 28° E. 1.88 chains along lane; thence

N. $62-1\frac{1}{2}^{\circ}$ W. 1.52 chains; thence
N. 4° E. 1.37 chains; thence
N. $33-1\frac{1}{2}^{\circ}$ W. 2.63 chains along Kalehua; thence
S. $15-1\frac{1}{4}^{\circ}$ W. 1.44 chains along Auwaiolimu.

Area, 1141 square fathoms.

(e) All that certain piece or parcel of land situate in Peleula, Honolulu, City and County of Honolulu, Territory of Hawaii, described in L. C. A. No. 863 to Umiokalani, particularly bounded and described as follows:

APANA 1. House lot and loi. Beginning at North corner at Pauoa stream and running:

S. 41° E. 1 chain $15-10/12$ feet, or 81.1 feet;
thence [14]

S. 20° E. 1 chain $53-5/12$ feet, or 119.4 feet;
thence

S. $58-1\frac{1}{4}^{\circ}$ W. 1 chain $17-9/12$ feet, or 83.8 feet;
thence

S. $76-1\frac{1}{4}^{\circ}$ W. $15-10/12$ feet, or 15.9 feet; thence

N. 45° W. 1 chain $64-8/12$ feet, or 130.7 feet to road; thence

N. $32-1\frac{1}{2}^{\circ}$ E. 2 chains $19-9/12$ feet, or 151.8 feet along Nuuanu road.

Area, 663 square fathoms.

APANA 2. Beginning at East corner at bridge on North side of Nuuanu road, and running;

N. $84-1\frac{1}{4}^{\circ}$ W. 1 chain $30-3/12$ feet, or 96.3 feet along stream; thence

S. $61-3\frac{1}{4}^{\circ}$ W. 2 chains $48-3/12$ feet, or 180.3 feet along stream; thence

S. 29° E. 3 chains $1-3/12$ feet, or 199.3 feet along Kapena and Pehu to road; thence

N. $32\frac{1}{2}^{\circ}$ E. 4 chains $38\frac{4}{12}$ feet, or 302.3 feet
along Nuuanu road.

Area, 743 square fathoms.

(f) All those certain pieces or parcels of land situate in Manananui at Ewa, City and County of Honolulu, Territory of Hawaii, described in L. C. A. No. 5873 to Kahanaumaikai, particularly bounded and described as follows:

APANA 1. In Ili of Keahua. Beginning at North corner, and running:

S. 5° E.

S. $22\frac{1}{2}^{\circ}$ E. 4.23 chains, or 279.2 feet; thence

S. 61° E. 3.60 chains, or 237.6 feet; thence

S. 84° E. 2.10 chains, or 138.6 feet along Paauau
pond; thence

N. 69° E. 2.00 chains, or 132 feet along Paauau
pond; thence

N. 22° W. 8.00 chains, or 528 feet along Kauhi;
thence

N. 71° W. 6.20 chains, or 409.2 feet along Kam-
auoaeawa.

Area, 5.48 Acres. [15]

APANA 2. Pond and lois. Beginning at South-west corner, and running:

S. 64° E. 2.80 chains, or 184.8 feet along Paauau;
thence

N. $62\frac{1}{2}^{\circ}$ E. 1.00 chain, or 66.0 feet along Paauau;
thence

N. 32° E. 3.40 chains, or 224.4 feet along Kaho-
lona; thence

N. $8\frac{1}{2}^{\circ}$ W. 1.90 chains, or 125.4 feet along Kaho-
lona; thence

- N. 59° E. 2.00 chains, or 132.0 feet along Kaholona; thence
S. 45° E. 1.48 chains, or 97.7 feet along Kaholona; thence
N. 39° W. 2.74 chains, or 180.8 feet along Lolei; thence
N. 58° W. 5.25 chains, or 346.5 feet along Kaholona; thence
S. 35° W. 4.47 chains, or 295.0 feet along Ili of Kamuliwai; thence
S. 50° E. 1.90 chains, or 125.4 feet along Ili of Kamuliwai; thence
S. 50° W. 4.30 chains, or 283.8 feet along Ili of Kamuliwai; thence
S. 10° E. 3.90 chains, or 257.4 feet along Paauau to place of beginning.

Area, 3.30 Acres.

APANA 3. At Kalokomoo. Beginning at North corner and running:

- S. 58° W. 1.25 chains, or 82.5 feet, along Kaholona; thence
S. 23° E. 2.74 chains, or 180.8 feet along Kumuhakane; thence
S. 40° E. 6.10 chains, or 402.6 feet along Kumuhakane; thence
N. 36° E. 0.99 chains, or 65.3 feet along Kumuhakane; thence
N. 27° W. 0.87 chains, or 57.4 feet along Kumuhakane; thence
N. 36° E. 2.19 chains, or 144.5 feet along Waimano; thence

N. 44° W. 1.97 chains, or 130.0 feet along Kamaewa-
ewa; thence

S. 66° W. 0.80 chains, or 52.8 feet along Kamaewa-
ewa; thence

N. 42° W. 4.60 chains, or 303.6 feet along Kamae-
waewa to initial point.

Area, 1.775 Acres. [16]

APANA 4. At Kealapii in Ili of Keahua. Be-
ginning at South corner, and running:

N. 80° E. 2.60 chains, or 171.6 feet along Kuhe-
leloa; thence

N. 22° W. 10.60 chains, or 699.6 feet along Wai-
mano; thence

S. 56° W. 4.00 chains, or 264 feet along Kaho-
lona; thence

S. 21° E. 2.50 chains, or 155 feet along Lolei;
thence

N. 68° E. 2.00 chains, or 132 feet along Kapaia;
thence

S. 16-1/2° E. 6.40 chains, or 422.4 feet along Kapaia
to initial point.

Area, 2.919 Acres.

APANA 5. At Kumupali in Ili of Keahua. Be-
ginning at South corner, and running:

N. 52° E. 1.54 chains, or 101.6 feet along Kaholona;
thence

N. 24° W. 9.41 chains, or 621.1 feet along Kanakao-
kai; thence

S. 71° W. 2.95 chains, or 194.7 feet along Lihue;
thence

S. 19° E. 2.90 chains, or 191.4 feet along Kupihea;
thence

S. 49° W. 3.53 chains, or 233 feet; thence

S. 72° W. 1.69 chains, or 111.5 feet along Kuheleloa;
thence

S. 32° E. 1.83 chains, or 122.8 feet along Kaho;
thence

N. 64° E. 4.70 chains, or 310.2 feet along Kamaile;
thence

S. 45° E. 4.66 chains, or 307.6 feet.

Area 3.816 Acres.

II.

That said plaintiff is entitled to said land by inheritance as the heir of Alexandrina Leihulu Keohokalo, deceased, and is entitled to the immediate use and possession of said premises.

III.

That the defendant above-named claims said property adversely to the plaintiff and plaintiff is desirous of having their [17] respective titles adjudicated and quieted, and that the defendant is a necessary party to the complete determination and settlement of the questions involved herein.

WHEREFORE, the plaintiff prays that the defendant be summoned to answer this complaint and that he may be required to set up any adverse claim which he may have in and to the aforesaid pieces or parcels of land, or any part thereof, and that the title to the said pieces or parcels of land be quieted and plaintiff's ownership in fee simple to the same may be confirmed, and that a writ of possession issue to place plaintiff in possession of said property, and for costs of this suit and for such other relief as to the Court may seem meet.

Dated, Honolulu, T. H., September 20, 1916.

(S.) MELEANA KALEHUA,
Plaintiff.

(S.) ANDREWS & PITTMAN,
J.,
Attorneys for Plaintiff.

Territory of Hawaii,
City and County of Honolulu,—ss.

Meleana Kalehua, being first duly sworn, deposes and says: That she is the plaintiff in the above-entitled action named; that she has heard read the foregoing bill of complaint and knows the contents thereof and that the same is true of her knowledge.

(S.) MELEANA KALEHUA.

Subscribed and sworn to before me this 20 day of September, A. D. 1916.

[Seal] (S.) JAS. K. JARRETT,
Notary Public, First Judicial Circuit, Territory of Hawaii.

[Endorsed]: Filed at 1:35 o'clock P. M. September 21st, 1916. (S.) J. A. Dominis, Clerk. [18]

In the Circuit Court of the First Circuit, Territory of Hawaii.

A. D. 1916 TERM.

(STAMPS \$2.00)

MELEANA KALEHUA,
Plaintiff,
vs.
HENRY CLARK,
Defendant.

Term Summons.

The Territory of Hawaii: To the High Sheriff of the Territory of Hawaii, or His Deputy; the Sheriff of the City and County of Honolulu, or His Deputy, or any Police Officer.

YOU ARE COMMANDED to summon Henry Clark, defendant, in case he shall file written answer within twenty days after service hereof, to be and appear before the said Circuit Court at the term thereof pending immediately after the expiration of twenty days after service hereof; provided, however, if no term be pending at such time, then to be and appear before the said Circuit Court at the next succeeding term thereof, to wit, The A. D. 1917 Term thereof, to be holden at Honolulu, City and County of Honolulu, on Monday, the 8th day of January next, at 10 o'clock A. M., to show cause why the claim of Meleana Kalehua, plaintiff, should not be awarded to her pursuant to the tenor of her annexed Complaint.

And have you then there this writ with full return of your proceedings thereon.

WITNESS the Honorable Presiding Judge of the Circuit Court of the First Circuit at Honolulu aforesaid, this 21st day of September, 1916.

[Court Seal]

(S.) J. A. DOMINIS.

Clerk.

Sheriff's Return to Term Summons.

Served the within summons as follows: On Henry Clark, therein named as defendant, at Honolulu, City and County of Honolulu, T. H., on this 22d day of

September, A. D. 1916, by delivering to Noah W. Aluli, his attorney, a certified copy hereof and of the petition or complaint hereto annexed and at the same time showing him the original.

Dated Honolulu, Sep. 22d, 1916.

(S.) PATRICK GLEASON,
Deputy High Sheriff.

[Endorsed]: L. No. 8543, Reg. 6, p. 9. Circuit Court, First Circuit. Meleana Kalehua, Plaintiff, vs. Henry Clark, Defendant. Term Summons. Issued at 1:35 o'clock P. M., September 21st, 1916. (S.) J. A. Dominis, Clerk. Received at 9:20 A. M. Sep. 22, A. D. 1916. (S.) P. Gleason, Deputy High Sheriff. Returned at 1:30 o'clock P. M., September 25th, 1916. (S.) J. A. Dominis, Clerk. Andrews & Pittman, Attorneys for Plaintiff. Pau, Judgment for Deft. Feb. 15/17. (S.) Claus L. Roberts, Clerk. [19]

*In the Circuit Court of the First Judicial Circuit.
Territory of Hawaii.*

JANUARY TERM, A. D. 1916.

ACTION TO QUIET TITLE.

MELEANA KALEHUA,

Plaintiff,

vs.

HENRY CLARK,

Defendant.

Answer of Defendant.

Now comes Henry Clark, whose full and true name is Henry N. Clark, defendant, by his attorneys, Carlos A. Long and Noa W. Aluli, and answering the complaint of the plaintiff filed in the above-entitled action, denies each and every allegation in the said complaint contained.

WHEREFORE, defendant demands judgment, that the complaint of the plaintiff be dismissed with costs.

Dated, Honolulu, T. H. September 29, 1916.

(S.) CARLOS A. LONG and
NOA W. ALULI,
Attorneys for Defendant.

[Endorsed]: Law No. 8543. Reg. 6, pg. 9. Circuit Court, First Circuit, Territory of Hawaii. Meleana Kalehua, Plaintiff, vs. Henry Clark, Defendant. Answer of Defendant. Filed September 30, 1916, at 25 minutes past — o'clock A. M. (S.) J. A. Dominis, Clerk. Attorneys for Defendant.
[20]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

JANUARY TERM, A. D. 1916.

ACTION TO QUIET TITLE.

MELEANA KALEHUA,

Plaintiff,

vs.

HENRY CLARK,

Defendant.

Stipulation as to Facts.

The following are stipulated as facts, and shall be considered and taken as duly proved and in evidence in the above-entitled action, upon the trial thereof and in any and all proceedings herein.

1. That the common source of title of the said plaintiff and the said defendant was and is in Alexandrina Leihulu Keohokalole, deceased, in and to all the property mentioned in said complaint, and that it should not be necessary for the plaintiff to prove the same.

2. That on the 6th day of August, 1912, the said Alexandrina Leihulu Keohokalole
(S.) L.A. married the said defendant, whose
(S.) N.W.A. full and true name is Henry N. Clark,
Diego,
in San Francisco, City and County of
Diego,
San Francisco, State of California.

3. That the said Alexandrina Leihulu Keohokalole (or Alexandrina Leihulu Clark), died intestate

on March 23, 1914, leaving ~~her husband~~ the said defendant Henry N. Clark, and leaving no children, or father or mother or brother or sister or nephew or niece.

4. That the said plaintiff, Meleana Kalehua, a female, was a cousin of the said Alexandrina Leihulu Keohokalole (Alexandrina Leihulu Clark), that is to say, she, the said plaintiff, was not [21] the mother nor the sister nor the descendant of a deceased sister or brother of the said Alexandrina Leihulu Keohokalole (Alexandrina Leihulu Clark).

5. That nothing in this stipulation contained shall preclude either the plaintiff or the defendant from offering further any additional evidence in this action, upon matters not concluded hereby.

IN WITNESS WHEREOF, the parties hereto, by their respective attorneys, have herewith set their hands on this 2 day of October, 1916.

MELEANA KALEHUA,

Plaintiff,

By (S.) ANDREWS & PITTMAN,

Her Attorneys.

HENRY CLARK, Whose Full and True Name
is HENRY N. CLARK, Defendant.

By (S.) CARLOS A. LONG and

(S.) NOA W. ALULI,

His Attorneys.

The foregoing stipulation is approved and the same ordered to be filed as a part of the record in

the above-entitled action, this 17 day of October, 1916.

(S.) WM. L. WHITNEY,
Second Judge, First Judicial Circuit, Territory of
Hawaii.

[Endorsed]: Circuit Court, First Judicial Circuit,
Territory of Hawaii. Jany. Term, 1916. Meleana
Kalehua, Plaintiff, vs. Henry Clark, Defendant.
Stipulation. L. 8543 6/9. Filed Feb. 14, 10:00
A. M., 1917. (S.) B. N. Kahalepuna, Clerk. An-
drews & Pittman, Attorneys for Ptff. Carlos A.
Long and Noa W. Aluli, Attorneys for Defendant.
[22]

JANUARY, 1917, TERM.

THURSDAY, FEBRUARY 15, 1917.

Court opened at two o'clock P. M.

Judge Presiding: Hon. C. W. ASHFORD, First
Judge.

Clerk: CLAUS L. ROBERTS,

Reporter: J. L. HORNER.

L. No. 8543—JURY WAIVED.

MELEANA KALEHUA

vs.

HENRY CLARK.

Minutes of Court, February 15, 1917—Trial.

Lorrin Andrews, Esq. (of Andrews & Pittman),
counsel for plaintiff.

Messrs. Noa W. Aluli and Carlos A. Long, attor-
neys for defendant.

The stipulation filed herein on the 14th day of February, 1917, was read by Mr. Aluli, of counsel for defendant.

On behalf of plaintiff, Mr. B. N. Kahalepuna, a clerk of this court, was called, sworn, and examined, as a witness.

Counsel for plaintiff offered the records of the Circuit Court, First Circuit, in the case of Emma H. N. Clark vs. Henry C. Clark, being Divorce No. 4304, for the purpose of showing that there was never a valid divorce between the defendant in this case and his former wife.

It was stipulated by counsel that Henry C. Clark, named in D. No. 4304 as libellee, is the same person as the defendant in this case.

Mr. Aluli objects to the admission of the record.

Court admits the record and the same was received in evidence and marked Plaintiff's Exhibit "A."

At two o'clock and fifteen minutes P. M. plaintiff rests.

There being no objection, counsel for defendant reads into the record herein extracts from the records of the third division of this court, to wit, "Chamber Records, Third Judge, Vol. VIII" (page 129 and page 149).

It is stipulated by counsel that there are no further proceedings in the minutes of this court except those read by Mr. Aluli, counsel for defendant, and is also stipulated that no further summons or any other process was served on Henry C. Clark, libellee therein, except the original summons.

At two o'clock and twenty-five minutes P. M. defendant rests.

Argument.

At 2:30 o'clock P. M. the case was submitted. [23]

Decision.

The COURT.—“I will support the defense upon the ground that the decree of divorce of October 26, 1911, granted in the case brought by Emma H. N. Clark against Henry C. Clark, namely, the present defendant (D. No. 4304), was a good and valid decree of divorce; that thereafter the present defendant was at liberty to marry and did marry Leihulu Keohokalole, and upon her death became and was her sole and only heir at law and as such inherited the property involved in this litigation; consequently, the Court grants judgment for the defense.”

Mr. Andrews, attorney for plaintiff, excepts to the decision of the Court as contrary to law and the evidence and the weight of the evidence.

At 2:40 o'clock P. M. Court adjourns.

By order of the Court:

(S.) CLAUS L. ROBERTS,
Clerk. [24]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

LAW No. 8543.

February 15, 1917.

MELEANA KALEHUA

vs.

HENRY CLARK.

Opinion of Circuit Court.

I think that there is no denying the general proposition advanced by Mr. Andrews that everyone is entitled to his day in court. Now, his client is entitled to her day in court with reference to any claim which she may make to this or any other property; there is no doubt of that, and it, of course, would be going entirely too far to claim that third parties, whose actions she could not control, could, by any agreement between themselves, in matters where she was not involved, for instance in suits at law where she was not a party, bind or preclude or foreclose her rights. They certainly could not do it. Any agreement that Mr. and Mrs. Clark, the former Mrs. Dreier, may have made with reference to their divorce at that time, could not possibly preclude this plaintiff or anyone else with reference to her or their claims upon this property or any other property; but, while fully admitting that, we find now that she is in court and she is confronted with this kind of defense, admitted in the stipulation, that the party from whom they claim as a common source, namely, Leihulu, was the owner of the property; that she, Leihulu, married Henry Clark in California upon a certain date stated. Not, that, of course, carries with it the [25] implication that it was a legal marriage, it seems to me, but I will go further with the stipulation,—“that Leihulu died leaving her surviving no parents, child, brother, sister or the issue of any deceased brother or sister,”—consequently, from that state of affairs, it would appear that her hus-

band, if she had one, was her heir at law. Now, the defendant claims to be that husband, and this claim is combated by the plaintiff and the ground of combat is that at the time of marrying Leihulu, or assuming to marry Leihulu, he had another matrimonial union with the former Mrs. Dreier, still undissolved, and in support of this they introduce the record in, let us call it, the Dreier-Clark divorce suit. Now, it appears that that very case has very recently been before the Supreme Court and that Court has unanimously decided that the facts and circumstances set forth in that record constituted and resulted in a legal and valid divorce of the former Mrs. Dreier-Clark from Henry Clark, the present defendant. If it did, then Henry Clark was, so far as the Court is informed at the present time, at full liberty to marry Leihulu, and afterwards did marry her, and, if so, then he was her legal husband, and, if he was the legal husband, then he was her heir at law. But it is again objected by the plaintiff that the present plaintiff was in no sense a party to any of those proceedings, neither the proceeding of Clark versus Clark, Divorce 4304 in this court, nor was she a party to the proceeding in which the Supreme Court rendered that decision, namely, in the matter of the estate of Alexandrina Leihulu Clark, deceased, and that the decision of the Supreme Court in that case did not foreclose her rights. That is absolutely good law; there can be no fault found with that, and I imagine that the defendants do not claim that her rights were foreclosed [26] by that decision. But

that decision is valuable and instructive, if not decisive, in this case.

It is suggested that this Court is now at liberty, just as the Supreme Court will be at liberty if the case goes there, as it probably will, to protect her from this decision in the Estate of Clark, because it is not *res adjudicata*; the question here is not *res adjudicata*; it may be *stare decisis*; that is to say, we have the authority of a previous decision by our highest court, and a unanimous decision at that, upon these very facts and this very particular divorce now involved. Nevertheless, as I said before, it is not decisive in this case, but even although it is not decisive, it is so far persuasive that I can see no reason why this court, being a court inferior to the Supreme Court, should undertake now, for reasons of its own, to decide contrary to the decision there. It is perfectly competent for this Court to do so; there is no doubt about that, simply because the decision in the Estate of Leihulu Clark is not decisive in this case, but, although it is competent, is it prudent? As the native would say, "Heaha ka waiwai?" What is the use? Perhaps they will decide the same way again, perhaps they will not. If it goes up there I am going to give them a chance, and I will support the defense upon the ground that the decree of divorce of October 26, 1911, granted in the case brought by Emma H. N. Clark against Henry C. Clark, namely, the present defendant, was a good and valid decree of divorce; that thereafter the present defendant was at liberty to marry, and did marry, Leihulu Keohokalole, and, upon her death, became and was her sole

and only heir at law, and, as such, inherited the [27] property involved in this litigation; consequently grant judgment for the defense.

Dated this 19th day of February, 1917.

[Court Seal] (S.) C. W. ASHFORD,
First Judge, First Circuit Court.

[Endorsed]: Law No. 8543. 6/9. Circuit Court, First Circuit, Territory of Hawaii. Meleana Kalehua, Plaintiff, vs. Henry N. Clark, Defendant. Filed at 11:50 o'clock A. M., February 15, 1917. (S) B. N. Kahalepuna, Clerk. Carlos A. Long and Noa W. Aluli, Attorneys for Defendant. [28]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

JANUARY TERM, A. D. 1916.

ACTION TO QUIET TITLE.

MELEANA KALEHUA,

Plaintiff,

vs.

HENRY CLARK,

Defendant.

Exceptions to Decision of Circuit Court.

Now comes the plaintiff above-named, by her attorneys, Andrews & Pittman, and excepts to the decision rendered in the above-entitled cause by the Honorable C. W. Ashford, First Judge of the First Circuit Court, trying said cause, jury waived, and filed in this Court on the 19th day of February, 1917, on the ground that the same is contrary to the law, the evidence and the weight of evidence.

Dated Honolulu, T. H., February 19, A. D. 1917.

(S.) ANDREWS & PITTMAN,
Attorneys for Plaintiff.

[Endorsed]: L. No. 8543. 6/9. Circuit Court, First Circuit, Territory of Hawaii. Meleana Kalehua, Plaintiff, vs. Henry Clark, Defendant. Exception to Decision. Filed February 20, 1917, at 20 minutes past 3 o'clock P. M. (S.) B. N. Kahalepuna, Clerk. Andrews & Pittman, 37 Merchant Street, Honolulu, T. H., Attorneys for Plaintiff.
[29]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

JANUARY TERM, A. D. 1916.

ACTION TO QUIET TITLE.

MELEANA KALEHUA,

Plaintiff,

vs.

HENRY CLARK,

Defendant.

Judgment of Circuit Court.

This action having been brought by the plaintiff alleging that she is entitled in fee simple absolutely to certain pieces and parcels of land situate in the city and county of Honolulu, Territory of Hawaii, set forth and described in plaintiff's complaint, coming on to be heard before me on the 15th day of February, 1917, when the parties appeared and were at

issue to the Court, jury being waived.

The Court, having heard the parties, finds for the defendant that the bill of the plaintiff be dismissed.

Therefore, it is adjudged that defendant recover of the plaintiff his costs.

By the Court:

[Court Seal] (S.) CLAUS L. ROBERTS,
Clerk.

[Endorsed]: L. No. 8543. Reg. —, pg. 9. In the Circuit Court of the First Judicial Circuit, Territory of Hawaii. Meleana Kalehua, Plaintiff, vs. Henry Clark, Defendant. Judgment. Filed Feb. 27, 11:19, A. M., 1917. (S.) B. H. Kahalepuna, Clerk. [30]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

JANUARY TERM, A. D. 1916.

ACTION TO QUIET TITLE.

MELEANA KALEHUA,

Plaintiff,

vs.

HENRY CLARK,

Defendant.

Exceptions to Judgment of Circuit Court.

Now comes the plaintiff above-named, by her attorneys, Andrews & Pittman, and excepts to the judgment rendered in the above-entitled cause by the Honorable C. W. Ashford, First Judge of the First Circuit Court, trying said cause, jury waived, and filed in this court on the 27th day of February, 1917,

on the ground that the same is contrary to the law,
the evidence and the weight of evidence.

Dated Honolulu, T. H., February 27, A. D. 1917.

(S.) ANDREWS & PITTMAN,
Attorneys for Plaintiff.

[Endorsed]: L. No. 8543. 6/9. Circuit Court,
First Circuit, Territory of Hawaii. Meleana Kale-
hua, Plaintiff, vs. Henry Clark, Defendant. Excep-
tion to Judgment. Filed February 27, 1917, at 20
minutes past 11 o'clock A. M. (S.) B. N. Kahale-
puna, Clerk. Andrews & Pittman, 37 Merchant
Street, Honolulu, T. H., Attorneys for Plaintiff.
[31]

**Plaintiff's Exhibit "A"—Divorce Record in Cause
Entitled "Emma H. N. Clark vs. Henry N.
Clark."**

*In the Circuit Court of the First Circuit, Territory
of Hawaii.*

(Stamped \$2.00.)

EMMA H. N. CLARK,

Libellant and Plaintiff,

vs.

HENRY N. CLARK,

Libellee and Defendant.

Libel for Divorce.

To the Honorable the Presiding Judge, at Chambers,
of the Circuit Court of the First Judicial Cir-
cuit, Territory of Hawaii:

Comes now Emma H. N. Clark, libellant herein,
and for cause of action against the above-named
libellee and defendant, and for grounds for divorce

from the said Henry C. Clark, alleges as follows:

1. That both libellant and libellee have been residents of this Territory for more than two years prior to the filing of this Libel.

2. That heretofore, and on, to wit, the 8th day of October, A. D. 1910, at and within the Territory of Hawaii, the said libellant intermarried with the said libellee, the marriage ceremony having been performed by a person duly and regularly authorized to solemnize marriages within the Territory of Hawaii, and having been celebrated and performed in the said city of Honolulu, Territory of Hawaii.

3. That said libellant and libellee herein cohabited and [32] lived together as wife and husband, at the said city of Honolulu, in said territory, until about the first day of July, A. D. 1911, and since said first day of July, have not lived together as wife and husband, and that the last place in which said libellant and libellee did live together as wife and husband was at the said city of Honolulu, Territory of Hawaii.

4. That shortly after the celebration of said marriage ceremony, the said libellee began, and up to the first day of July, 1911, continued, a course of positive ill-treatment of and toward, and a marked and studied neglect of said libellant, amounting and constituting extreme cruelty. And libellant in this respect alleges as follows, to wit:

That libellant, at the time of the marriage aforesaid was the widow of one August E. Dreier, deceased; that the said August E. Dreier up to the time of his death had lived in the Hawaiian Islands for

a great many years, and had been well and favorably known throughout the Hawaiian Islands, and had formed a large circle of acquaintances and friends; that as his wife and the mother of — his children, libellant had become well known throughout the Hawaiian Islands, and had likewise formed many acquaintances and friendships; that at the time of her marriage to libellee, libellant was of the age of fifty-two years; that at the time of said marriage the said libellee was but twenty-four years of age; that at the time of said marriage the said libellant had property in her own right to a considerable amount, and an income therefrom sufficient to maintain her comfortably in life, while said libellee was without means of any nature whatsoever; that libellant entered into the marriage aforesaid with the said libellee, believing that said libellee reciprocated the genuine love and affection which she had for the said libellee, and believing that the libellee entered into the said marriage solely on account of genuine love [33] and affection for the libellant, and without any ulterior motives whatsoever; that shortly after said marriage, the libellee began taunting libellant with the fact that she was many years older than he, and on many occasions—during some of which friends and acquaintances of the parties hereto were present,—spoke in an extremely insulting and vulgar manner to libellant concerning her age, and of the necessity of his associating with females more nearly his own age than was libellant, to the humiliation and shame of the libellant; that ever since said marriage the libellee has utterly failed and refused to

secure employment of any nature whatsoever, and has insisted that he should live entirely off and from the means possessed by libellant; that on many occasions he has ridiculed libellant to her friends and acquaintances, stating that she, libellant, had "bought her boy," meaning libellee, and would have to provide for him. That shortly after said marriage said libellee began to associate with various young women within the city of Honolulu, and to spend money provided by libellant on said women freely and without stint; that libellee at all times concealed from libellant his conduct in the last-mentioned respect, and libellant learned it only from friends who communicated it to her; that about the 24th day of May, A. D. 1911, libellee, on the pretense that he was searching for employment in the city of Honolulu, absented himself from home and went on an automobile trip with several young men and women, to a place on the windward side of the Island of Oahu; that during said trip and at said place the said libellee to his companions spoke of and concerning libellant in an insulting and degrading manner, and boasted to his companions that he would continue to live with the libellant only because she could provide money for him to enjoy himself with women nearer his own age; that on another occasion, the exact date of which libellant cannot now give, the libellee returned home late at night, in a [34] semi-intoxicated condition, and in the presence of two companions, whom he brought with him into the house of the libellant, openly reviled her and insulted her, to her great humiliation, stating, amongst other

things, that he, the libellee, did not care for her on account of her age, and did not care for her because she had reached the age, according to him, when she could not bear children. That prior to the marriage hereinbefore mentioned, the libellee had been intimate with and had cohabited with a married woman, residing within the Territory of Hawaii; that subsequent to the marriage libellee continued to be intimate with the said married woman; that the said married woman, during the month of April, A. D. 1911, secured a divorce from her husband; that after the said divorce was secured, the said libellee, more openly and flagrantly than before, sought the company of and associated with the said married woman, stating that if libellant herein would secure a divorce, he would then marry her, the said married woman.

That on or about the 24th day of May, A. D. 1911, the libellant having in the meantime learned of the action of the said libellee, refused to further live with the said libellee, and refused to permit the said libellee to remain in her house, and refused to provide him with any more money or to purchase for him any more clothing, stating to him that until he had demonstrated the sincerity of his affection for her by abandoning the course which he had pursued up to that time, and had shown that the marriage was not one entered into by him from ulterior motives and for the purpose only of securing for himself money and other property, by securing employment at some honorable calling, he would no longer be permitted to live with her; that libellant at that time informed libellee that it was

not her desire to secure a divorce from him, and that the action taken by her was solely for the benefit of his own welfare, and that she was much averse [35] to having a public record made of the grievous wrongs she had suffered through his action; that within a few days said libellee came to libellant and admitted that he had grossly and wantonly insulted and humiliated and disgrace the libellant in the past, but that should he be forgiven, he would in the future conduct himself in all respects as a good citizen and a good husband should; that thereupon, and upon the faith of the promises so made, libellant permitted libellee to return to the house and live with her, and provided him with all money necessary to enable him to live in a decent and proper style; that within a very few days after his return, the said libellee entered upon the same course of treatment which he pursued prior to the promise of reformation, and in a few weeks had conducted himself towards her, both in her presence and in the presence of friends and acquaintances of libellant, and used such insulting and vulgar language to and of and concerning her, that it was no longer possible for her to live with him further; that his conduct in the respects aforesaid was such as to render life almost unbearable, and to create great mental anguish in her, and to seriously injure her health, both physical and mental; that remonstrance from her to him concerning such conduct, at times resulted in denials that the same had been engaged in, and at other times, when it became apparent to libellee that libellant had accurate knowledge con-

cerning such conduct, in further *insulats* and vile and abusive language towards her.

That the said libellee, though of sufficient ability to provide suitable maintenance for the libellant, and although often requested so to do, and although often requested to provide at least sufficient means to properly maintain and clothe himself, has, ever since the said marriage, refused to do so, and refused to make any attempt whatsoever to do so. And in this respect libellant says that her request to him so to provide for her and for himself was [36] not made for the sole reason that she herself would suffer in any manner without said provision being made, but in order that libellee might not be pointed out by the public as one who married solely in order to be properly fed and clothed and maintained without the necessity of any labor whatsoever on his part.

WHEREFORE, libellant prays that the bonds of matrimony heretofore and now existing between libellant and libellee be dissolved, for extreme cruelty, and for failure, neglect and refusal on the part of libellee, being of sufficient ability, to secure suitable maintenance for libellant; and that her former name of Emma C. Dreier be restored to her; and for such other and further relief as to this Honorable Court shall seem meet.

Dated Honolulu, Hawaii, August 2, A. D. 1911.

EMMA H. N. CLARK,

Libellant.

R. W. BRECKONS,

Attorney for Libellant. [37]

C. Clark, to appear thirty days after service hereof, before such Judge of the Circuit Court of the First Circuit as shall be sitting at Chambers in the courtroom of said Judge, in the Judiciary Building in Honolulu, City and County of Honolulu, to answer the annexed Libel in Divorce of Emma H. N. Clark.

And have you then there this writ with full return of your proceedings thereon.

WITNESS the Honorable Presiding Judge at Chambers and seal of the Circuit Court of the First Circuit, at Honolulu aforesaid, this 2d day of H. S. August
of ~~July~~, 1911.

[Seal]

HENRY SMITH,
Clerk. [39]

Sheriff's Return to Divorce Summons.

Served the within Divorce Summons as follows:
On Henry N. Clark, at Honolulu, this 2d day of August, 1911, by delivering to him a certified copy hereof and of the petition or libel annexed hereto and at the same time showing him the original.

Dated Honolulu, Aug. 2, 1911.

CHARLES H. ROSE,
Deputy Sheriff.

[Endorsed]: D. No. 4304, Reg. 3, pg. 300. Circuit Court, First Circuit. Emma H. N. Clark v. Henry N. Clark. Divorce Summons. Issued at 3:07 o'clock P. M., Aug. 2, 1911. Henry Smith, Clerk, 26. Honolulu Police Dept. Received Aug. 2, 1911, at 3:35 o'clock P. M. Charles H. Rose, ~~Clerk~~. Returned

at 10:05 o'clock A. M., Aug. 3d, 1911. A. K. Aona,
Clerk. Pau.

Tuesday, Aug. 8, 1911.

Divorce Granted.

M. T. SIMONTON,
Clerk.

*In the Circuit Court of the First Circuit, Territory of
Hawaii.*

EMMA H. N. CLARK,
Libellant and Plaintiff,
vs.

HENRY C. CLARK,
Libellee and Defendant.

Answer to Libel for Divorce.

Comes now Henry C. Clark, libellee and defendant herein, and admits that libellant and libellee have been residents of this territory for more than two years prior to the filing of this libel; that they were intermarried as set forth in the libel herein, and that they last cohabited together as husband and wife in the city of Honolulu, in the said Territory of Hawaii; and that libellee denies each and every other allegation in said libel for divorce set forth.

WHEREFORE, libellee prays that the libel herein may be dismissed, and for his costs herein expended.

HENRY CLARK,
Libellee.

Subscribed and sworn to before me this 3 day of July, A. D. 1911.

ANTONE MANUEL,
Notary Public, 1st Circuit.

[Endorsed]: D.No. 4304, Reg. 3, pg. 300. Circuit Court, First Circuit, Territory of Hawaii. Emma H. N. Clark, Libellant, vs. Henry C. Clark, Libellee. Answer to Libel for Divorce. Filed Aug. 3, 1911, at 1:50 o'clock P. M. V. M. Harrison, Clerk. [40]

In the Circuit Court of the First Circuit, Territory of Hawaii.

EMMA H. N. CLARK,
Libellant and Plaintiff,
vs.

HENRY C. CLARK,
Libellee and Defendant.

Consent as to Time of Trial.

I, libellee in the above-entitled case, do hereby consent that the hearing of the libel herein may be
Tuesday,
heard by the above-entitled Court on ~~Monday~~, the
eighth
~~seventh~~ day of August, A. D. 1911.

HENRY N. CLARKE,
Libellee.

Subscribed and sworn to before me this 8th day of August, 1911.

[Seal]

ANTONE MANUEL,
Notary Public 1st Circuit.

[Endorsed]: D. No. 4304, Reg. 3, pg. 300. In the Circuit Court of the First Circuit. Territory of Hawaii. Emma H. N. Clark, Libellant and Plaintiff, vs. Henry C. Clark, Libellee and Defendant. Consent as to Time of Trial. Circuit Court, First Circuit. Filed August 8, 1911, at 9:10 o'clock A. M. M. T. Simonton, Clerk. Robert W. Breckons, Attorney for Libellant. [41]

In the Circuit Court of the First Circuit, Territory of Hawaii.

AT CHAMBERS.

EMMA H. N. CLARK,

Libellant,

vs.

HENRY CLARK,

Libellee.

Decree of Divorce.

Before the Honorable ———, Judge Presiding.
Openly in the Public Courtroom of Said Judge.

On this eighth day of August, A. D. 1911, at the courthouse in the city of Honolulu, openly in the public courtroom of said Judge, came on duly to be heard the petition of said above-named libellant, of the city and county of Honolulu, praying that the bonds of matrimony heretofore existing between them, the said Emma H. N. Clark and Henry C. Clark, be dissolved by reason of the alleged extreme cruelty on the part of libellee towards libellant, and failure on the part of the libellee, being of sufficient ability, to provide suitable maintenance for libellant.

And the said libellant being present in court before said Judge, due proof was made to this Court that the said parties are legally intermarried, and that the allegations in said petition are true. [42]

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the bonds of matrimony existing between the said Emma H. N. Clark and the said Henry C. Clark be, and the same are hereby, dissolved.

IT IS FURTHER HEREBY ORDERED, ADJUDGED AND DECREED, that the said libellant be restored to her former name of Emma H. N. Dreier. It is further ordered that this decree take effect and be in force from and after this date, to wit:

August 8th, A. D. 1911.

[Seal]

W. J. ROBINSON,

Judge of the Circuit Court of the First Circuit.

[Endorsed]: D.No. 4304, Reg. 3, pg. 300. Circuit Court, First Circuit, Territory of Hawaii. Emma H. N. Clark vs. Henry C. Clark. Decree of Divorce. Circuit Court, First Circuit. Filed August 8, 1911, at 10 o'clock A. M. M. T. Simonton, Clerk. Robert W. Breckons, Attorney for Libellant. [43]

*In the Circuit Court of the First Circuit, Territory of
Hawaii.*

AT CHAMBERS.

Before the Honorable W. J. ROBINSON, Judge
Presiding.

Openly in the Public Courtroom of said Judge.
EMMA H. N. CLARK,

Libellant,

vs.

HENRY C. CLARK,

Libellee.

Decree of Divorce.

On this twenty-sixth day of October, A. D. 1911, at the courthouse in the city of Honolulu, openly in the public courtroom of said Judge, came on duly to be heard the petition of said above named libellant of the city and county of Honolulu, praying that the bonds of matrimony heretofore existing between them, the said Emma H. N. Clark and Henry C. Clark, be dissolved by reason of the alleged extreme cruelty of the said libellee, and neglect and refusal on the part of the libellee, being of sufficient ability to provide suitable maintenance for the libellant for a continued period of more than sixty days

And the said libellant being present in court before said Judge, due proof was made to this Court that the said parties are legally intermarried, and that the allegations in said petition are true— [44]

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, That the bonds of matrimony existing

between the said Emma H. N. Clark and the said Henry C. Clark be, and the same are hereby, dissolved and that the said Emma H. N. Clark be permitted to resume her former name of Emma Dreier, and that this decree shall take effect and be in force from and after this date, to wit, October 26th, 1911.

[Seal]

W. J. ROBINSON,

Judge of the Circuit Court of the First Circuit.

[Endorsed]: D. 4304. Reg. 3/300. Circuit Court, First Circuit, Territory of Hawaii. Emma H. N. Clark, Libellant, vs. Henry C. Clark, Libellee. Decree of Divorce. Filed October 26th, A. D. 1911, at 2:15 o'clock P. M. V. M. Harrison, Clerk. [45]

[Endorsed]: Number 4304, Divorce Division. Circuit Court, First Circuit. Emma H. N. Clark vs. Henry C. Clark. 1911. Divorce Granted. Entered in Docket 28D, page 26, Record 3, page 300. Henry Smith, Clerk.

L. No. 8543. Plaintiff's Exhibit "A." Filed Feb. 15, 1917. Claus L. Roberts, Clerk.

No. 1013. Rec'd and filed in the Supreme Court Mar. 28, 1917, at 11:15 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [46]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

Divorce #4304.

(Previously granted. Retrial.)

EMMA H. N. CLARK,

Libellant,

vs.

HENRY C. CLARK,

Libellee.

Testimony.

Before Hon. W. J. ROBINSON, Presiding.

Thursday, October 26th, 1911.

APPEARANCES:

MR. W. R. BRECKONS, Attorney for Libellee.

**Testimony of Mrs. Emma H. N. Clark, in Her Own
Behalf.**

MRS. EMMA H. N. CLARK, being first duly sworn in her own behalf, testified as follows:

(By Mr. BRECKONS.)

Q. State your name. A. Emma Dreier.

Q. Are you acquainted with Henry C. Clark?

A. Yes, sir.

Q. Were you ever married to him?

A. I was married to him.

Q. When? A. Last year. [47]

Q. Do you remember the date?

A. October 8th.

Q. How long have you resided in the Territory of

(Testimony of Mrs. Emma H. N. Clark.)

Hawaii—more than two years? A. Oh, yes.

Q. Has Mr. Clark resided in the Territory of Hawaii more than two years? A. I think so.

Q. When did you and Mr. Clark—where did you and Mr. Clark last live together as husband and wife? A. At Puuni, Island of Oahu.

Q. From the time Mr. Clark and you were married did he contribute anything towards your support and maintenance? A. Not a cent.

Q. Was he able to do it; is he in good health, able to work?

A. He was able but he didn't like to do it.

Q. From the time he was married to you how did he treat you? State whether or not he ever left you, tell us why he left you and the matters that led up to your final separation.

A. He was leaving me to run with another person.

Q. You say he was running with other persons; male or female, do you particularly mention?

A. With a lady in town.

Q. Did you ever accuse him of that on more than one occasion? A. I did.

Q. And on the occasions when you did accuse him what did he say? A. It was his business.

Q. At any time when you accused him did you tell him at any time where he had been, did he say whether he had or not?

A. He used to say "no" at times.

Q. At times did he say anything other than "no"?
[48] A. Yes.

Q. What did he tell you then, what did he say?

(Testimony of Mrs. Emma H. N. Clark.)

A. He said it was his business.

Q. To you, in the presence of others, did he ever make any comment or say anything about your age?

A. Yes, he did.

Q. What was that circumstance you refer to ?

A. That I was too old for him.

Q. Too old for what? Tell about the incident when Henry Hughes and George Beckley were there.

A. What was it?

The COURT.—State, Mrs. Clark. There is no reason why you should be diffident about the matter: this is a public courtroom. It is your duty to state exactly what was said by Henry Clark at the time he made this statement.

A. He said I was too old to have a family.

(Mr. BRECKONS.)

Q. How did the conversation come on?

A. When they came in—he was out with a party and they got home about one o'clock in the morning; he brought these two young men; they all sat down and he asked me to come in and get some beer and some cake, and I did bring it to the table. I cut the cake, and Mr. Beckley said it was delicious. He asked my husband: "Are you raising a cow that you can get your milk and butter?" He said, "Yes, we are raising chickens and everything." Mr. Beckley said: "Can't you raise anything better than that?"

Q. Then what did Mr. Clark say?

A. We couldn't.

Q. Did he say why?

(Testimony of Mrs. Emma H. N. Clark.)

A. Because I was too old. [49]

Q. What did you say?

A. I said he knew how I looked before we got married, why didn't he leave me then.

Q. Will you please tell us about when you and Mr. Clark first separated? A. May 24th.

Q. How long did he remain away?

A. One week (?); then he came back.

Q. When he came back what did he tell you?

A. He asked forgiveness.

Q. Forgiveness for what?

A. For doing what he thought was wrong.

Q. What was that?

A. His going with this woman.

Q. Who was that woman? A. Mrs. —.

Q. That was a woman he knew before he married?

A. Yes, sir.

Q. Then after he returned to you he continued to live up to what time?

A. Until after the second of January.

Q. Then what happened? A. I sent him away.

Q. Why?

A. Because he couldn't do anything to support me, or he wouldn't do it.

Q. What was there at that time, if anything, about this woman? What did he say to you about her that you finally sent him away, or finally parted, do you remember? A. Yes.

Q. What was it? [50]

A. He said he would get married.

Q. Married to who?

(Testimony of Mrs. Emma H. N. Clark.)

A. He said if I would get a separation from him he would marry this woman.

Q. Prior to your marriage to him did you talk to him about the woman?

A. He told me that he was going to tell her that he was going to marry me, and he went and told her and she said it was all right.

Q. At the time you married Mr. Clark I believe he had been fined for something in court. How much was that? A. One thousand.

Q. Who paid that? A. I paid it myself.

Q. During the time you lived with him who supplied him with his pocket money and money for clothing? A. I did all the time.

The COURT.—How about the household expenses; did he contribute anything to them?

A. Nothing whatever.

Mr. BRECKONS.—Q. Your health—up to the time you separated from him in what condition was your health? A. Very poor.

Q. To what do you attribute that?

A. Well, sorrows and heart trouble.

Q. Then—to put it in a nutshell—there was trouble with Henry all the time? A. Yes. [51]

WITNESS.—I ask to resume my maiden name, Emma Dreier.

The COURT.—Let the prayer of the petition be, and the same is hereby, granted; let the bonds of matrimony heretofore and now existing between the libellant and the libellee be and the same are hereby dissolved. This decree shall take effect and be in

(Testimony of Mrs. Emma H. N. Clark.)

force from and after this date, October 26th, 1911, and that the said Mrs. Emma H. N. Clark be permitted to resume her former name of Emma Dreier.

Proceedings here closed. [52]

Honolulu, T. H., February 18, 1916.

This is to certify that the foregoing and attached six typewritten pages contain a full, true and correct transcript from my shorthand notes of the testimony taken and proceedings had in the matter of the libel for divorce of Emma H. N. Clark vs. Henry C. Clark, heard before the Hon. W. J. Robinson, at the time and place therein mentioned.

P. MAURICE McMAHON,

Ex-Official Reporter, First Circuit Court, Territory of Hawaii.

[Endorsed]: D. 4304. Circuit Court, First Circuit, Territory of Hawaii. R. 3/300. Emma H. N. Clark, Libellant, vs. Henry C. Clark, Libellee. Transcript of Testimony. Filed Feb. 18, 1916. Henry Smith, Clerk. P. Maurice McMahan, Reporter. [53]

*In the Circuit Court of the First Judicial Circuit,
Territory of Hawaii.*

LAW No. 8543.

MELEANA KALEHUA,

vs.

HENRY CLARK.

February 15, 1917.

The COURT.—What are the appearances, gentlemen?

Mr. ANDREWS.—I appear for the plaintiff, if the Court please, Andrews & Pittman.

Mr. ALULI.—Mr. Long and myself appear for the defendant, Henry Clark. We have filed our general denial, the defendant, and also our waiver of trial by jury, and we also have filed a stipulation which reads as follows: (Reads.) That is the stipulation. Of course Mr. Andrews has some more witnesses, some more evidence to offer.

Mr. ANDREWS.—Perhaps I can briefly outline the reason of this suit. (Makes opening statement.)

Mr. Aluli has agreed with me to practically stipulate all the facts that it would be necessary to prove in regard to technically proving our claim to this estate, and I understand—if I am incorrect Mr. Aluli will correct me, and with his consent I make this offer of proof: That the plaintiff in this case, Mrs. Meleana Kalehua, will be able to prove, and will prove, if necessary, and it is admitted that—as proof, that one Malo and David Malo were brothers; that David married—David Malo married one Lipaka and by her had one child named Emma, who married John Kapana; that the child of Emma and John Kapana was Leihulu, who is the common source of title in this case; [54] that the brother of David Malo married a woman named Kauai; that they had one child, Momona; that Momona married a woman named Kamaka and that the child of—child of Kamaka and Momona is the plaintiff herein.

Mr. ALULI.—The plaintiff is first cousin to Leihulu.

Mr. ANDREWS.—First cousin.

Mr. ALULI.—That has been admitted in the stipulation.

Mr. ANDREWS.—And there are no other—and that she is the nearest relative; there are no other relatives as near as that.

The COURT.—I understand that is practically admitted.

Mr. ANDREWS.—Yes.

Mr. ALULI.—Yes.

The COURT.—In the stipulation.

Mr. ALULI.—Yes.

Mr. ANDREWS.—Now, then, that having been proved, your Honor, and being on the record, I think the only thing—Is the clerk here? I will try and call the clerk of the court to introduce the records.

The COURT.—I would like to ask you gentlemen what you think of my qualification or disqualification to sit here. I advised the defendant some years ago concerning his rights in this property as against the so-called Maikai heirs. Now, whether your plaintiff is one of the Maikai heirs I don't know.

Mr. ANDREWS.—She is not one of the Maikai heirs; she claims to be nearer. I think that it was the Maikai heirs that brought the suit.

Mr. LONG.—Yes, that brought the suit.

The COURT.—Well, then, it was not with reference to the claim that you now urge?

Mr. ANDREWS.—No, your Honor. [55]

The COURT.—That I advised—?

Mr. LONG.—No.

Testimony of B. N. Kahalepuna, for Plaintiff.

B. N. KAHALEPUNA, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ANDREWS.)

Q. What is your position, Mr. Kahalepuna?

A. My name, B. N. Kahalepuna, clerk of Circuit Court of the First Circuit.

Q. And have you the custody of the papers belonging to that court? A. Yes, I have.

Q. Will you produce, please, divorce record 4304, Clark vs. Clark? A. Yes.

Mr. ANDREWS.—We will ask the defense to admit that the Henry C. Clark in these divorce proceedings is the same Henry Clark that we name as defendant in this case. It is marked here in the divorce paper Henry C. Clark.

Mr. ALULI.—We object, may it please the Court, to the introduction of these papers.

Mr. ANDREWS.—Well, will you admit that it is the same man?

Mr. ALULI.—Yes.

Mr. ANDREWS.—I have not offered the papers yet. I now, if the Court please, offer the divorce record—that's all, Mr. Kahalepuna, thank you. I now offer divorce record No. 4304, Circuit Court of the First Circuit, Emma H. N. Clark versus Henry C. Clark, for the purpose of showing that there was never a valid divorce between the defendant in this case and his former wife.

(Testimony of B. N. Kahalepuna.)

The COURT.—Now, may I ask you if that is the same divorce [56] record, or the record in the same case, as has been passed upon by the Supreme Court in the case entitled *In the Matter of the Estate of Alexandrina Leihulu Clark, deceased*?

Mr. ANDREWS.—Yes, your Honor.

The COURT.—At page 453 of the 23d Hawaiian?

Mr. ANDREWS.—Yes, your Honor.

Mr. ALULI.—Exactly the same.

The COURT.—And do you admit that the Supreme Court in that case reached the conclusion that the divorce of Mrs. Clark from the present defendant in that case was legal and valid?

Mr. ANDREWS.—Yes. We want to offer it in evidence for the purpose, however, of showing—getting it on the record and showing that so as we can make it a part of our record.

Mr. ALULI.—We object to it, may it please the Court. It is immaterial and incompetent evidence in that, first, it is a collateral attack made by parties, strangers, to the record, and, secondly, that it has already been ruled by the Supreme Court that this decree of divorce was valid.

The COURT.—Well, we have hardly reached that, it seems to me, until the record itself is before the Court.

Mr. ALULI.—I thought it had been offered.

The COURT.—I will admit the record as Exhibit “A” for the plaintiff in this case.

Mr. ANDREWS.—Well, I think, unless I have

(Testimony of B. N. Kahalepuna.)

omitted something very important, I think that is our case.

The COURT.—Well, I don't know much about that record. What is it?

Mr. ANDREWS.—Let me call your Honor's attention, then, to the record, that shows as follows—

The COURT.—Just give me the number of that.
[57]

Mr. ANDREWS.—Yes. 4304, No. 4304. (Makes statement to the Court.)

The COURT.—In other words, then, there are two decrees of divorce, or what purports to be two decrees of divorce,—one dated the 8th of August, 1911, and another one dated—

Mr. ANDREWS.—26th of October, 1911.

The COURT.—26th of October, 1911.

Mr. ANDREWS.—Well, I think, if the Court please, then, I rest my case.

The COURT.—Very well, plaintiffs rest.

Mr. ALULI.—It appears from the record at chambers, Third Judge, Volume 8, Judge Robinson's record, the following, on page—

The COURT.—You propose to introduce that?

Mr. ALULI.—Yes, page 129.

The COURT.—Any objection to this?

Mr. ANDREWS.—No, your Honor.

Mr. ALULI.—(Reading:) "Monday, October 23, 1911. Present, Honorable W. J. Robinson, Third Judge. M. T. Simonton, clerk. P. Maurice McMahon, reporter, in the matter of setting aside decree of divorce. The Court, at 9 o'clock A. M. this day

(Testimony of B. N. Kahalepuna.)

orders: 'Mr. Clark, it is ordered that the decrees of divorce heretofore entered in the case, a list of which I have here, on the various dates and days specified in such list, all of such cases being divorce cases, are hereby vacated and set aside on the ground and for the reason that said decrees, and all thereof, are void and of no force and effect, the same having been rendered and entered in such causes of action prior to the expiration of thirty days from and after service of process or appearance in each of said actions respectively.' [58]

"The cases in which the decrees of divorce are vacated and set aside are as follows:"— There are one hundred and twenty-one cases—one hundred and twenty-six cases, and in the list we find the number of the divorce case which has been introduced as an exhibit—what is the number, 4382?

The CLERK.—4304.

Mr. ALULI.—4304. We also find, which explains the two decrees.

Mr. ANDREWS.—Is that all you want to put in?

Mr. ALULI.—And we also offer the following: "Thursday, October 26, 1911. Present—" Page 149, same volume—

The COURT.—You are willing that this also may be read?

Mr. ANDREWS.—Yes, your Honor.

Mr. ALULI.—(Reading:) "Present Honorable W. J. Robinson, Third Judge, M. T. Simonton, clerk, P. Maurice McMahon, reporter. Divorce 4304. Emma H. N. Clark versus Henry N. Clark, Libel

(Testimony of B. N. Kahalepuna.)

for divorce. This cause came on for hearing and trial at 9:10 o'clock A. M. R. W. Breckons, Esquire, appearing as attorney for libelant, Henry N. Clark, libelee, not appearing in person or by attorney, but having filed an answer denying each and every allegation of the libel except the marriage. Emma H. N. Clark, libelant, is called, sworn and examined. Thereupon the Court orders: 'Let the prayer of the libel be and the same is hereby granted, and let the bonds of matrimony heretofore and now existing between the libelant and the libelee be, and the same are, hereby dissolved.

It is further ordered that the libelant be and she is hereby permitted to resume her former name of Emma H. N. Dreier.

It is further ordered that this decree take effect and [59] be in force from and after this day, to wit, October 26th, A. D. 1911.' "

Mr. ANDREWS.—Now, will you admit, Mr. Aluli, that there are no further proceedings in the minutes except these that you have rendered of record in this suit?

Mr. ALULI.—That's all.

Mr. ANDREWS.—No further proceedings?

Mr. ALULI.—No further proceedings.

Mr. ANDREWS.—And you will admit that there is nothing further on the record showing any further notification at all, either to appear—

Mr. ALULI.—The records will show that, the records and transcript of evidence.

Mr. ANDREWS.—Will show that that is the fact?

(Testimony of B. N. Kahalepuna.)

Mr. ALULI.—Yes.

Mr. ANDREWS.—That no further summons was ever served on Clark except the original summons?

Mr. ALULI.—That is admitted.

Mr. ANDREWS.—No further summons or any other process ever served on Clark after the original.

The COURT.—Very well, what have you in defense?

Mr. ALULI.—We are objecting to the introduction of this record.

The COURT.—Why, that record has been introduced long ago.

Mr. ALULI.—That is, as an exhibit?

The COURT.—Yes, as an exhibit, introduced in evidence and read, or portions of it read. I told you that we couldn't pass upon that thing very well until it was before the Court,—pass upon its legal effect.

Mr. ALULI.—Will you admit that the first husband of Leihulu, Keohokalole, is still living? [60]

Mr. ANDREWS.—We don't know anything about that. That has not anything to do with our case.

Mr. ALULI.—Oh, yes, it has. I will take the stand—

The COURT.—What has it to do with your case, Mr. Aluli?

Mr. ALULI.—Why, we answered that—that this plaintiff is not entitled to the land at all. General denial was filed. We can offer any evidence affecting her claim and we want to show—we want to go up to the Ninth Circuit, if needs be, showing that, even though this decree is held void, still she does

(Testimony of B. N. Kahalepuna.)

not come in because her first husband is still living, who was her next heir.

The COURT.—Why is it necessary to go into that question if Henry Clark is the heir? What do we care if Meleana Kalehua, or the Maikai heirs, stand next in order?

Mr. ALULI.—That may be so, but under our general denial we have the right to offer any objection against this party, plaintiff, and we propose not only to show that we are the legal husband of the decedent, but to further show to the Court that even though their move is correct, even though this decree should be set aside, still there are other parties who are entitled to this land.

(Argument.)

Mr. ALULI.—No further testimony, your Honor.

The COURT.—You rest?

Mr. ALULI.—We rest.

(Judgment granted for the defense.)

Mr. ANDREWS.—We except to the decision as contrary to the law and the evidence and the weight of evidence. [61]

I HEREBY CERTIFY the above and foregoing to be a complete and accurate extension of my shorthand notes of the proceedings had and testimony taken during the trial of the above entitled cause.

JAMES L. HORNER.

Official Reporter.

Del. to this — day of Feb., 1917.

[Endorsed]: L. 8543. Circuit Court, First Circuit, Territory of Hawaii. Meleana Kalehua, Plaintiff.

tiff, vs. Henry N. Clark, Defendant. Transcript of Evidence taken February 15, 1917. Filed at 8:50 o'clock A. M. March 28th, 1917. B. N. Kahalepuna, Clerk.

No. 1013. Rec'd and Filed in the Supreme Court. Mar. 28, 1917, at 11:15 o'clock A. M. Robert Parker, Jr., Assistant Clerk. [62]

Opinion of Supreme Court, Territory of Hawaii.

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

No. 1013.

MELEANA KALEHUA v. HENRY CLARK.

ERROR TO CIRCUIT COURT, FIRST
CIRCUIT.

Hon. C. W. ASHFORD, Judge.

Submitted May 28, 1917. Decided June 1, 1917.

ROBERTSON, C. J., QUARLES and COKE, JJ.

PER CURIAM.—This is a writ of error to review the judgment of the Circuit Court rendered in an action to quiet title to certain land situated in the city and county of Honolulu in which the plaintiff in error was the plaintiff, judgment having been given for the defendant.

It was admitted that the title to the land was in Alexandrina Leihulu Clark (formerly Keohokalole) at the time of her death; that she died intestate on March 23, 1914, leaving no children, parents, brother, sister, nephew or niece; and that the decedent was a cousin of the plaintiff. Under our statute of descent the husband of the intestate, if she left one, would

be the sole heir of the intestate. It was admitted that the defendant and the decedent were intermarried at San Diego, California, on August 6, 1912, but the validity of the marriage is questioned. The contention of the plaintiff in error is that the defendant was not the lawful husband of the decedent because, at the time of their purported marriage, he had a wife living, and this raises the question whether the defendant had been legally divorced from his former wife. This very question was passed upon in the case of *Estate of Clark*, 23 Haw. 451, 454, [63] and was determined adversely to the plaintiff's contention. It appeared that on August 2, 1911, the defendant's former wife, Emma H. N. Clark, instituted against her husband a suit for divorce alleging extreme cruelty and failure to provide; that on the following day the libellee filed his answer admitting the jurisdictional facts and denying the grounds for divorce set forth; that on August 8, 1911, the libellee filed a consent to a hearing of the case on that day, and a hearing was had and a decree of divorce entered; that on October 23, 1911, after the decision of the case of *Markle v. Markle*, 20 Haw. 633, that decree was set aside; that on October 26, another hearing was had on the same pleadings and another decree granting the divorce entered; and that the record did not show that the libellee had notice that the second hearing was to be had. In *Estate of Clark, supra*, this Court held that the decree in the divorce case was at most voidable, but not void, and was not subject to collateral attack. There is no material change in the facts, and no new points of law have

been presented. We are satisfied that the former case was correctly decided, and hold that, for the reasons there set forth, the decision should be adhered to. The defendant, then, was the sole heir of his deceased wife, and the plaintiff inherited no estate in the land in dispute.

The judgment of the Circuit Court is affirmed.

ANDREWS & PITTMAN, for Plaintiff in Error.

C. A. LONG and N. W. ALULI, for Defendant in Error.

By the Court.

J. A. THOMPSON,
Clerk.

[Endorsed]: No. 1013. Supreme Court, Territory of Hawaii. October Term, 1916. Meleana Kalehua v. Henry Clark. Decision. Filed June 1, 1917, at 10:55 A. M. J. A. Thompson, Clerk. [64]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1916.

ERROR TO CIRCUIT COURT, FIRST
CIRCUIT.

MELEANA KALEHUA

vs.

HENRY CLARK.

Judgment of Supreme Court, Territory of Hawaii.

In the above-entitled cause, pursuant to the deci-

sion of the above-entitled court rendered on the 1st day of June, A. D. 1917, the judgment of the Circuit Court of the First Judicial Circuit, filed on the 27th day of February, 1917, is affirmed.

Dated Honolulu, T. H., June 6, 1917.

By the Court.

[Seal]

J. A. THOMPSON,
Clerk Supreme Court.

R.

[Endorsed]: No. 1013. Supreme Court, Territory of Hawaii. October Term, 1916. *Meleana Kalehua vs. Henry Clark*. Judgment. Filed June 6, 1917, at 2:55 o'clock P. M. J. A. Thompson, Clerk. [65]

In the Supreme Court of the Territory of Hawaii.

OCTOBER TERM, 1915.

No. 935.

In the Matter of the Estate of ALEXANDRINA
LEIHULU CLARK, Deceased.

APPEAL FROM CIRCUIT JUDGE, FIRST
CIRCUIT.

Hon. W. L. WHITNEY, Judge.

Argued July 24, 1916. Decided August 11, 1916.

ROBERTSON, C. J., WATSON and QUARLES,
JJ.

Appeal and Error — Probate — Decree of Distribution.

For the purpose of appeal a decree of distribution is regarded as a final decree.

Divorce—Judgment—Collateral Attack.

A decree of divorce rendered by a court having jurisdiction of the subject matter and of the parties cannot be collaterally attacked for errors or irregularities; that libellee is not notified of the time of the second trial, the original decree having been vacated, is not such a jurisdictional defect as will render the second decree void.

Same—Same—Effect of Vacating.

Where a decree in a suit for divorce is vacated because thirty days had not elapsed after the completion of service of summons on the libellee, it is proper for the court to treat the suit as still pending and retry the same, after the expiration of the thirty days limited by statute, upon the evidence then adduced. [66]

**Opinion of Supreme Court, Territory of Hawaii by
Watson, J.**

Opinion of the Court by WATSON, J.

This is an appeal from a decree of distribution made by a circuit judge of the first circuit sitting at chambers in probate. The case comes to this court on an appeal allowed by the circuit judge as an interlocutory appeal. Such allowance by the circuit judge was not required, as a decree of distribution is for the purpose of an appeal a final decree.

Alexandrina Leihulu Clark, a resident of Honolulu, died intestate on March 23, 1914, leaving no children, or father or mother, or brother or sister,

or nephew or niece. Her estate was duly administered upon and upon the petition of the administrator for the allowance of his final accounts, distribution and discharge this controversy arose. Appellee, Henry N. Clark, to whom was ordered distributed the personal property of the estate, claims to have been the husband of Alexandrina Leihulu Clark at the time of her death and as such the sole heir at law of such intestate. This claim was disputed by several persons in the court below, among others, by the appellant, David U. K. Maikai, who, with his brother, Samuel I. Maikai, since deceased, claimed that they were the nearest surviving next of kin of said intestate and as such entitled to all of the property of said estate; that Henry N. Clark was never legally married to Alexandrina Leihulu Clark, because he was never legally divorced from his first wife, generally known as Mrs. Dreier, and because intestate was never legally divorced from her first husband, one Morris Keohokalole. Thus it will be seen that the sole question presented for our consideration and determination is whether or not, at the time of the death of Alexandrina Leihulu Clark, Henry N. Clark, appellee herein, was her husband, for if he was it is conceded that under the facts in this case and under the laws of [67] this Territory he is entitled, as sole heir at law, to inherit all of the property of said decedent.

The facts upon which appellant bases his contention, that Alexandrina Leihulu Clark was never legally divorced from her first husband, Morris Keohokalole, were found by the trial judge, and are un-

disputed, as follows: Intestate married said Morris Keohokalole on November 5, 1887; on April 3, 1911, she filed divorce proceedings against him on the grounds of desertion and failure to provide; a summons was duly served on libellee April 4, 1911, and on the following day libellee answered admitting all the jurisdictional facts but denying the desertion and failure to provide; the action went to trial on April 18, 1911, a decree being granted on that day; this decree was set aside by the trial judge of his own motion on account of a decision of this court (*Markle v. Markle*, 20 Haw. 633) holding that circuit judges were without jurisdiction to hear or determine divorce cases until the expiration of thirty days after the completion of service of summons on the libellee. The case was next tried on December 23, 1911, on the same pleadings, libellant alone being present in court. The transcript of testimony of this second trial, which was introduced and received in evidence in the lower court, and which is included in the record before us, shows that all of the jurisdictional facts were put in evidence and a decree was granted on the last-mentioned date. One of the grounds of attack on this decree in the case at bar is directed to the fact that the libellee was not in court and the claim that he was not notified of the time and place of the second trial. The circuit judge found that the evidence of Morris Keohokalole in the matter at bar, which has not been sent up as a part of the record herein, was not conclusive on this point, as to whether or not he was notified of the time and place of the second trial, but [68] we

will assume in favor of libellant's contention that said libellee was not so notified.

In the Clark divorce the facts were very similar. The libellant in that case, Emma H. N. Clark, generally known as Mrs. Dreier, married Clark, October 8, 1910; on August 2, 1911, she filed a libel for divorce against him on the grounds of extreme cruelty and failure to provide; on the following day the libellee filed his answer admitting the jurisdictional facts and denying the grounds set forth; on August 8, 1911, libellee filed a consent to a hearing of the case on that day and a hearing was had and a decree entered. This decree was set aside for the same reason as the decre in the Kehokalole case. Another hearing was had on the same pleadings on October 26, 1911, and another decree entered. In this case, as in the Keohokalole case, we will assume that no notice of the second trial was given to Clark—evidence on this point having been offered and refused by the trial judge. The evidence before the circuit judge showed that Clark accepted the benefits of the decree and remarried—this time to the intestate, to whom he was still married at the time of her decease. In this case, as in the Keohokalole case, the evidence taken at the second trial shows proof of all the jurisdictional facts. The case therefore stands on the same footing as the first discussed case. In this court, as in the lower court, two reasons are urged why these second decrees of divorce, in the Keohokalole and Clark cases, respectively, are void: (1) that no notice of the second trial in either case was given to libellee, and (2) that the setting

aside of the original decrees of divorce made void all of the proceedings in the cases, and thereafter it was necessary to commence the cases anew.

As to the first ground, that libellee in neither of the cases above referred to had notice of the second trial, we [69] are clearly of the opinion that this is not a jurisdictional defect which would render the decrees void. The circuit judge before whom the divorce cases were pending had jurisdiction of the subject matter, and jurisdiction of the person of the libellee had been acquired in each case by personal service. The fact that the first decree in each case was later vacated did not have the effect of divesting the court of its jurisdiction theretofore acquired. In 17 A. & E. Enc. L. (2d ed.) p. 1065, the distinction is pointed out between errors and irregularities rendering judgments voidable merely and jurisdictional defects which render the proceedings void. It is there said that "those defects which relate to the jurisdiction over the subject matter are generally of the class which render the proceedings void. On the other hand, there are few defects in the proceedings of a court of justice which render the proceedings void, in the strict sense of that word, where the court has jurisdiction of the subject matter of the suit." See also *State v. Richmond*, 26 N. H. (6 Foster) 232. In *Salter v. Hilgen*, 40 Wis. 363, the court held that "Where a Circuit Court, having jurisdiction of the subject matter of an action and of the parties, renders judgment for the plaintiff as for default of an answer, before the time for answering has in fact expired, the judgment is *irregular*

but not void." In this Territory there is no statute requiring the giving of notice of trial. 38 Cyc. 1271. We hold that the proceedings had upon the second trial of the divorce cases were at most *voidable* and not *void*, and that the decrees entered in such cases, being valid on their faces, are not open to collateral attack in this proceeding.

We think there is no merit in the second ground urged by counsel, that the setting aside of the first decrees of divorce made void all of the proceedings in the cases, and necessitated [70] the commencement of the cases anew. This contention finds no support in the Markle case, *supra*, that case having been remanded to the circuit judge with instructions to set aside the decree and for such further proceedings as might be appropriate. The circuit judge, having vacated the original decrees on the ground that thirty days had not elapsed after the completion of service of summons on the libellees, respectively, correctly treated the causes as still pending, proceeded to retry the same upon the evidence then adduced, and rendered the second decrees above referred to. 23 Cyc. 973, 974; Kelly v. Harrison (Miss.), 12 So. 261, 262.

It follows from what has been said that in our opinion the marriage of Henry N. Clark to intestate was a valid marriage, and intestate leaving neither child, father or mother, brother or sister surviving, her husband became and was her sole heir at law; also that evidence tending to prove who would have been the heirs at law of the intestate had she not

left surviving her a lawfully married husband was immaterial to the issues.

The decree appealed from is affirmed.

A. A. WILDER (STANLEY & WILDER, on the brief), for Appellant.

C. A. LONG and N. W. ALULI, for Appellee.

A. G. M. ROBERTSON.

E. M. WATSON.

RALPH P. QUARLES.

[Endorsed]: No. 935. Supreme Court, Territory of Hawaii. October Term, 1915. In the Matter of the Estate of Alexandrina Leihulu Clark, Deceased. Opinion. Filed Aug. 11, 1916, at 10:17 A. M. Robert Parker, Jr., Assistant Clerk. [71]

In the Supreme Court of the Territory of Hawaii.

MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

**Petition for Writ of Error and Supersedeas
Returnable to United States Circuit Court of
Appeals for the Ninth Circuit.**

To the Honorable the Chief Justice of the Supreme Court of the Territory of Hawaii:

Meleana Kalehua, the plaintiff in error in the above-entitled cause, deeming herself aggrieved by the judgment of the Supreme Court of the Territory

of Hawaii, entered and filed on the 6th day of June, 1917, in the above-entitled cause, entitled "Meleana Kalehua, plaintiff in error, vs. Henry Clark, defendant in error," comes now, by Andrews & Pittman, her attorneys, and hereby humbly petitions said Supreme Court of the Territory of Hawaii for an order allowing the said Meleana Kalehua, said plaintiff in error, to prosecute a writ of error and have the same allowed from the United States Circuit Court of Appeals for the Ninth Circuit to said Supreme Court of the Territory of Hawaii under and according to the laws of the United States in that behalf made and provided, and that a transcript of the record, proceedings and documentary exhibits upon which said judgment was made, duly authenticated, may be sent to said [72] United States Circuit Court of Appeals for the Ninth Circuit, and also that an order may be made by this Honorable Court fixing the amount of the bond which the said plaintiff in error shall give and furnish upon the said writ of error, and that upon the filing of such bond, all proceedings in and relating to the subject matter in and of the said cause in the said Supreme Court of the Territory of Hawaii and in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, whether direct or ancillary thereto, be suspended and stayed until the determination of such writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit.

And in this behalf your petitioner shows that the said judgment was rendered in an action at law and that the amount involved in said action, exclusive of

costs, exceeds the value of \$5,000.00.

WHEREFORE, your petitioner prays that a writ of error may issue out of this Court to the end that the errors existing in the record may be corrected and the said judgment reversed, and judgment given to the said plaintiff in error and full and complete justice may be done in the premises.

Dated Honolulu, T. H., December 3rd, 1917.

MELEANA KALEHUA,

Petitioner.

By (S.) ANDREWS & PITTMAN,

Her Attorneys. [73]

Territory of Hawaii,

City and County of Honolulu,—ss.

Meleana Kalehua, of the City and County of Honolulu, Territory of Hawaii, being first duly sworn, upon her oath, deposes and says:

That she is the plaintiff in error in the above-entitled cause, and is well acquainted with the matters in controversy in said cause, and that the amount involved in said cause, exclusive of costs, exceeds the value of Five Thousand Dollars (\$5,000.00).

(S.) MELEANA KALEHUA.

Subscribed and sworn to before me, this 1st day of November, 1917.

[Notarial Seal]

(S.) MABEL A. DOANBURY,

Notary Public, First Judicial Circuit, Territory of Hawaii.

Filed December 3, 1917, at 1:00 P. M. J. A. Thompson, Clerk. [74]

In the Supreme Court of the Territory of Hawaii.

MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

**Assignments of Error on Return to Writ of Error
Returnable to United States Circuit Court of
Appeals for the Ninth Circuit.**

Comes now Meleana Kalehua, the plaintiff in error in the above-entitled cause, by Andrews & Pittman, her attorneys, and says that in the record and proceedings in the above-entitled cause in the Supreme Court of the Territory of Hawaii, and in the rendition of its final judgment therein, there are, and have intervened, manifest errors prejudicial to the said plaintiff in error, to wit:

I.

That the said Supreme Court erred in affirming the judgment of the Circuit Court of the First Judicial Circuit of the Territory of Hawaii in said cause.

II.

That the said Supreme Court erred in not reversing the said judgment of the said Circuit Court and in not deciding that judgment should be entered in favor of the said plaintiff in error as prayed in her bill of complaint in said cause.

III.

That the said Supreme Court erred in deciding that

the divorce of Emma H. N. Clark vs. Henry C. Clark, who it is admitted is the defendant in error, being Divorce No. 4304, was a good [75] and valid divorce and that said Henry C. Clark was therefore able to legally marry Alexandrina Leihulu and, by said marriage, was her sole heir at law.

IV.

That the Supreme Court erred in rendering its decision against plaintiff in error and in favor of defendant in error, and further that the Supreme Court erred in sustaining the judgment of the Circuit Court of the First Judicial Circuit dismissing the complaint of the plaintiff in error and denying that she was the heir at law of Alexandrina Leihulu, and, for and on account of said errors assigned above, to all of which objection and exception was taken by the plaintiff in error, the plaintiff in error prays that all of the proceedings in said action be by this Honorable Court reviewed, and that said judgment of the said Circuit Court be set aside and such orders be entered herein as to this Honorable Court may seem meet and proper.

Dated at Honolulu, T. H., December 3d, 1917.

MELEANA KALEHUA,

Plaintiff in Error,

(S.) By ANDREWS & PITTMAN,

Her Attorneys, [76]

Filed December 3, 1917, at 1:00 P. M. J. A. Thompson, Clerk.

In the Supreme Court of the Territory of Hawaii.

MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

**Order Allowing Writ of Error Returnable to United
States Circuit Court of Appeals and Super-
sedeas.**

Upon reading and filing the foregoing petition for a writ of error, together with an assignment of errors presented therewith, alleged to have occurred in the judgment of this Court and in the proceedings in the trial of said cause prior thereto;

IT IS ORDERED that a writ of error be and the same is hereby allowed to the said Meleana Kalehua, to have reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered in the above-entitled cause and the proceedings in the trial of said cause prior thereto, and that the amount of bond on said writ of error be, and the same is hereby fixed in the sum of Five Hundred Dollars (\$500.00); and that upon the filing by said above-named plaintiff in error of an approved bond in said amount, all further proceedings in said cause in the said Supreme Court of the Territory of Hawaii and the Circuit Court of the First Judicial Circuit of the Territory of Hawaii, shall be stayed and suspended until the determination [77] of such writ of error by the said United States Circuit

Court of Appeals for the Ninth Circuit.

Dated at Honolulu, Territory of Hawaii, this 3d day of December, A. D. 1917.

[Seal]

[Seal] A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory
of Hawaii. [78]

[Endorsed]: No. 1013. In the Supreme Court of the Territory of Hawaii. Meleana Kalehua, Plaintiff in Error, vs. Henry Clark, Defendant in Error. Petition for Writ of Error and Supersedeas, Assignments of Error and Order Allowing Writ of Error. Filed December 3, 1917, at 1:00 P. M. J. A. Thompson, Clerk. Andrews & Pittman, Honolulu, T. H., Attorneys for Plaintiff in Error. [79]

In the Supreme Court of the Territory of Hawaii.

MELEANA KALEHUA.

Plaintiff in Error.

VS.

HENRY CLARK.

Defendant in Error.

**Supersedeas and Cost Bond on Writ of Error
Returnable to U. S. Circuit Court of Appeals.**

KNOW ALL MEN BY THESE PRESENTS: That we, Meleana Kalehua, as principal, and Y. Ahin, as surety, are held and firmly bound unto Henry Clark, in the sum of Five Hundred Dollars (\$500.00), to the payment of which, well and truly to be made, we do hereby jointly and severally firmly

bind ourselves and our respective heirs, successors, executors and administrators.

THE CONDITION of this obligation is as follows:

WHEREAS, in an action at law heretofore pending in and before the Supreme Court of the Territory of Hawaii, wherein said bounden principal was plaintiff in error, and obligee was defendant in error, the said Supreme Court did, on the 6th day of June, 1917, order, render and enter a judgment of said Supreme Court, wherein and whereby there was and is affirmed a certain judgment theretofore, to wit, the 27th day of February, 1917, rendered and entered in and by the Circuit Court for the First Circuit of said Territory, in a cause wherein said bounden principal was plaintiff, and said obligee was defendant, and which said judgment was in [80] favor of said defendant; and whereas said bounden principal has applied for, and is about to sue out, a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to said Supreme Court of the Territory of Hawaii to the end that the judgment of the said Supreme Court, above described, may be reviewed by said United States Circuit Court of Appeals for the Ninth Circuit, and has taken, or is about to take, such further and other proceedings as may be necessary to obtain a review by said United States Circuit Court of Appeals for the Ninth Circuit of the judgment last aforesaid;

NOW, THEREFORE, if the said bounden principal shall prosecute said writ of error to effect, and

shall answer all damages and costs if she fails to make her plea good, then the above obligation shall be void, otherwise to remain in full force and effect.

IN WITNESS WHEREOF, the said principal has set her hand and seal, and the said surety has set his hand and seal, hereunto this 4th day of December, A. D. 1917.

(S.) MELEANA KALEHUA,
Principal.
(S.) Y. AHIN,
Surety.

The foregoing bond is hereby approved as to form and sufficiency, this 4th day of December, 1917.

[Seal] A. G. M. ROBERTSON,
Chief Justice Supreme Court of the Territory of
Hawaii. [81]

[Endorsed]: No. 1013. In the Supreme Court of the Territory of Hawaii. Meleana Kalehua, Plaintiff in Error, vs. Henry Clark, Defendant in Error. Supersedeas and Cost Bond on Writ of Error Returnable to U. S. Circuit Court of Appeals. Filed December 4, 1917, at 10:55 A. M. J. A. Thompson, Clerk. Andrews & Pittman, Honolulu, T. H., Attorneys for Plaintiff in Error. [82]

In the Supreme Court of the Territory of Hawaii.

MELEANA KALEHUA,
Plaintiff in Error,
vs.
HENRY CLARK,
Defendant in Error.

**Writ of Error to the Supreme Court of the Territory
of Hawaii.**

The United States of America,—ss.

The President of the United States to the Honorable
Justices of the Supreme Court of the Territory
of Hawaii, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii, before you, or some of you, between Meleana Kalehua, plaintiff in error, and Henry Clark, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by her complaint appears:

We being willing that error, if any there hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty (30) days from the date hereof, that, [83] the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right, according to the

laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 4th day of December, in the year of our Lord one thousand nine hundred and seventeen.

[Seal] J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of Hawaii. [84]

[Endorsed]: No. 1013. In the Supreme Court of the Territory of Hawaii. Meleana Kalehua, Plaintiff in Error, vs. Henry Clark, Defendant in Error. Writ of Error to the Supreme Court of the Territory of Hawaii. Filed December 4, 1917, at 10:55 A. M. J. A. Thompson, Clerk. Andrews & Pittman, Honolulu, T. H., Attorneys for Plaintiff in Error. [85]

In the Supreme Court of the Territory of Hawaii.

ACTION TO QUIET TITLE.

MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

Citation on Writ of Error Returnable to United States Circuit Court of Appeals.

The United States of America,—ss.

The President of the United States to Henry Clark,

GREETING:

You are hereby cited and admonished to be and

appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty days after the date of this citation, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Meleana Kalehua is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 4th day of December, in the year of our Lord one thousand nine [86] hundred and seventeen.

A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory
of Hawaii.

[Seal] Attest: J. A. THOMPSON,
Clerk Supreme Court of the Territory of Hawaii.

Due service of the within Citation on Writ of Error returnable to the United States Circuit Court of Appeals for the Ninth Circuit, and receipt of copy thereof, is hereby admitted this 4th day of December, 1917.

CARLOS A. LONG,
Attorney for Henry Clark, Defendant in Error in
Above-entitled Cause. [87]

[Endorsed]: No. 1013. In the Supreme Court of the Territory of Hawaii. Meleana Kalehua, Plain-

tiff in Error, vs. Henry Clark, Defendant in Error. Citation on Writ of Error. Filed and issued for service December 4, 1917, at 10:55 A. M. J. A. Thompson, Clerk. Returned December 4, 1917, at 4:28 P. M. J. A. Thompson, Clerk. Andrews & Pittman, Honolulu, T. H., Attorneys for Plaintiff in Error. [88]

In the Supreme Court of the Territory of Hawaii.

MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

**Praeipce for Transcript of Record on Writ of Error
Returnable to United States Circuit Court of
Appeals for the Ninth Circuit.**

To JAMES A. THOMPSON, Esq., Clerk of the Supreme Court of the Territory of Hawaii:

You will please prepare a transcript of a record in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, and include in said transcript the following pleadings, proceedings, opinions, judgments and papers on file in said cause, to wit:

1. Petition for writ of error to the Circuit Court of the First Circuit, Territory of Hawaii, filed March 15, 1917.
2. Assignment of Errors.

3. Notice that writ of error has issued.
4. Summons of the Supreme Court, with return of service.
5. Bond on writ of error.
6. Writ of error to Circuit Court, First Circuit, Territory of Hawaii, issued March 15, 1917.
7. Bill of complaint, filed September 21, 1916.
8. Term summons of the Circuit Court, First Circuit, with return of service.
9. Answer of defendant, filed September 30, 1916.
10. Stipulation as to facts, filed February 14, 1917.
[89]
11. Minutes of the Clerk of the Circuit Court of the First Circuit, under date of February 14, 1917.
12. Decision of Hon. C. W. Ashford, First Judge of Circuit Court, First Circuit, filed February 19, 1917.
13. Exception by plaintiff to decision.
14. Judgment of the Circuit Court, First Circuit, filed February 27, 1917.
15. Exception by plaintiff to judgment.
16. Plaintiff's Exhibit "A," being divorce record entitled in the Circuit Court of the First Circuit "Emma H. N. Clark vs. Henry N. Clark," Numbered 4304, said record consisting of the following documents, viz:
 - (a) Libel for divorce, filed August 2, 1911.
 - (b) Divorce summons, filed August 2, 1911, with return of service.
 - (c) Answer of libellee, filed August 8, 1911.

- (d) Consent of libellee as to time of trial, filed August 8, 1911.
- (e) Decree of divorce, dated August 8, 1911.
- (f) Decree of divorce, dated October 26, 1911, with cover of the foregoing.
- (g) Transcript of testimony, filed February 18, 1916.
- 17. Transcript of proceedings and testimony in the above-entitled cause, under date of February 15, 1917.
- 18. Decision of the Supreme Court of Hawaii, filed June 1, 1917.
- 19. Judgment of the Supreme Court of Hawaii, filed June 6, 1917.
- 20. Opinion of the Supreme Court of Hawaii, rendered and filed August 11, 1916, in the case entitled "In the Matter of the Estate of Alexandrina Leihulu Clark, Deceased," (Number 935).
- 21. Petition for Writ of Error and Supersedeas, returnable to United States Circuit Court of Appeals for the Ninth Circuit.
- 22. Assignments of Error on return to Writ of Error returnable to United States Circuit Court of Appeals for the Ninth Circuit.
- 23. Order allowing Writ of Error returnable to United States Circuit Court of Appeals and Supersedeas.
- 24. Supersedeas and Cost Bond on Writ of Error returnable to U. S. Circuit Court of Appeals.
- 25. Writ of Error to the Supreme Court of the Territory of Hawaii.

26. Citation on Writ of Error, returnable to United States Circuit Court of Appeals, with acknowledgment of service thereof.

You will also annex to and transmit with the record the [90] original Writ of Error from the United States Circuit Court of Appeals for the Ninth Circuit, and original Citation with acknowledgment of service, your return of the Writ of Error under the seal of the Supreme Court of the Territory of Hawaii and also your certificate under seal stating in detail the cost of the record and by whom the same was paid.

Dated, Honolulu, T. H., December 5th, 1917.

Respectfully,

ANDREWS & PITTMAN,

Attorneys for Plaintiff in Error.

Service of a copy of the foregoing Praecipe for Transcript is hereby acknowledged.

CARLOS A. LONG and

NOA W. ALULI,

Attorneys for Defendant in Error.

[Endorsed]: No. 1013. Supreme Court, Territory of Hawaii. Meleana Kalehua, Plaintiff in Error, vs. Henry Clark, Defendant in Error. Praecipe for Transcript of Record on Writ of Error Returnable to United States Circuit Court of Appeals for the Ninth Circuit. Filed December 6, 1917, at 11:15 o'clock A. M. J. A. Thompson, Clerk. Andrews & Pittman, Honolulu, T. H., Attorneys for Defendant in Error. [91]

In the Supreme Court of the Territory of Hawaii.

MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

**Writ of Error to the Supreme Court of the Territory
of Hawaii.**

The United States of America,—ss.

The President of the United States to the Honorable
Justices of the Supreme Court of the Territory
of Hawaii, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the Territory of Hawaii, before you, or some of you, between Meleana Kalehua, plaintiff in error, and Henry Clark, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by her complaint appears:

We being willing that error, if any there hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same in the said United States Circuit Court of Appeals for

the Ninth Circuit at San Francisco, State of California, within thirty (30) days from the date hereof, that, [92] the records and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals for the Ninth Circuit may cause further to be done therein to correct that error, what of right, according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 4th day of December, in the year of our Lord, one thousand nine hundred and seventeen.

[Seal] J. A. THOMPSON,
Clerk of the Supreme Court of the Territory of
Hawaii. [93]

[Endorsed]: No. 1013. In the Supreme Court of the Territory of Hawaii. Meleana Kalehua, Plaintiff in Error, vs. Henry Clark, Defendant in Error. Writ of Error to the Supreme Court of the Territory of Hawaii. Filed December 4, 1917, at 10:55 A. M. J. A. Thompson, Clerk. Andrews & Pittman, Honolulu, T. H., Attorneys for Plaintiff in Error. [94]

In the Supreme Court of the Territory of Hawaii.

ACTION TO QUIET TITLE.

MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error,

**Citation on Writ of Error Returnable to United
States Circuit Court of Appeals.**

The United States of America,—ss.

The President of the United States to Henry Clark,
GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, State of California, within thirty days after the date of this citation, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the Territory of Hawaii, wherein Meleana Kalehua is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the party in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States, this 4th day of December, in the year of our Lord, one thousand nine [95] hundred and seventeen.

A. G. M. ROBERTSON,
Chief Justice of the Supreme Court of the Territory
of Hawaii.

[Seal] Attest: J. A. THOMPSON,
Clerk Supreme Court of the Territory of Hawaii.

Due service of the within citation on writ of error returnable to the United States Circuit Court of Appeals for the Ninth Circuit, and receipt of copy

thereof, is hereby admitted this 4th day of December, 1917.

CARLOS A. LONG,
Attorney for Henry Clark, Defendant in Error in
Above-entitled Cause. [96]

[Endorsed]: No. 1013. In the Supreme Court of the Territory of Hawaii. Meleana Kalehua, Plaintiff in Error, vs. Henry Clark, Defendant in Error. Citation on Writ of Error. Filed and Issued for Service December 4, 1917, at 10:55 A. M. J. A. Thompson, Clerk. Returned December 4, 1917, at 4:28 P. M. J. A. Thompson, Clerk. Andrews & Pittman, Honolulu, T. H., Attorneys for Plaintiff in Error. [97]

In the Supreme Court of the Territory of Hawaii.

MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

**Certificate of Clerk Supreme Court, Territory of
Hawaii to Transcript of Record.**

Territory of Hawaii,

City and County of Honolulu,—ss.

I, James A. Thompson, clerk of the Supreme Court of the Territory of Hawaii, by virtue of the foregoing Writ of Error and in obedience thereto, the original of which said Writ of Error is herewith returned, being pages 92 to 94, both inclusive, of the

foregoing transcript of record, and in pursuance to the praecipe to me directed, a copy whereof is hereto attached, being pages 89 to 91, both inclusive, DO HEREBY TRANSMIT to the Honorable United State Circuit Court of Appeals for the Ninth Circuit the foregoing transcript of record, being pages 1 to 65, both inclusive, and pages 72 to 88, both inclusive, and I DO HEREBY CERTIFY the same to be true, full and correct copies of the pleadings, exhibit, testimony, clerk's minutes, record, proceedings, opinions and final judgment which are on file and of record in the office of the clerk of the Supreme Court of the Territory of Hawaii in the case entitled in said court "Meleana Kalehua, Plaintiff in Error, vs. Henry Clark, Defendant in Error," Number 1013.

I FURTHER CERTIFY that pages 66 to 71, both inclusive, of the foregoing transcript of record is a full, true and correct copy of [98] the opinion of the Supreme Court of the Territory of Hawaii, rendered and filed on the 11th day of August, 1916, in the case entitled "In the Matter of the Estate of Alexandrina Leihulu Clark, Deceased, Number 935;

I DO FURTHER CERTIFY that the original citation on writ of error with acknowledgment of service thereof, being pages 95 to 97, both inclusive, of the foregoing transcript, are hereto attached and herewith returned;

I LASTLY CERTIFY that the cost of the foregoing transcript of record is Twenty-nine (\$29.00) Dollars, and that said amount has been paid by Messrs. Andrews & Pittman, Attorneys for Meleana Kalehua, Plaintiff in Error herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, at Honolulu, City and County of Honolulu, this 8th day of December, A. D. 1917.

[Seal]

JAMES A. THOMPSON,
Clerk Supreme Court of the Territory of Hawaii.

[99]

[Endorsed]: No. 3099. United States Circuit Court of Appeals for the Ninth Circuit. Meleana Kalehua. Plaintiff in Error, vs. Henry Clark, Defendant in Error. Transcript of Record. Upon Writ of Error to the Supreme Court of the Territory of Hawaii.

Filed December 18, 1917.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

NO. 3099

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE
NINTH CIRCUIT

MELEANA KALEHUA,

Plaintiff in Error,

vs.

HENRY CLARK,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR

LORRIN ANDREWS,

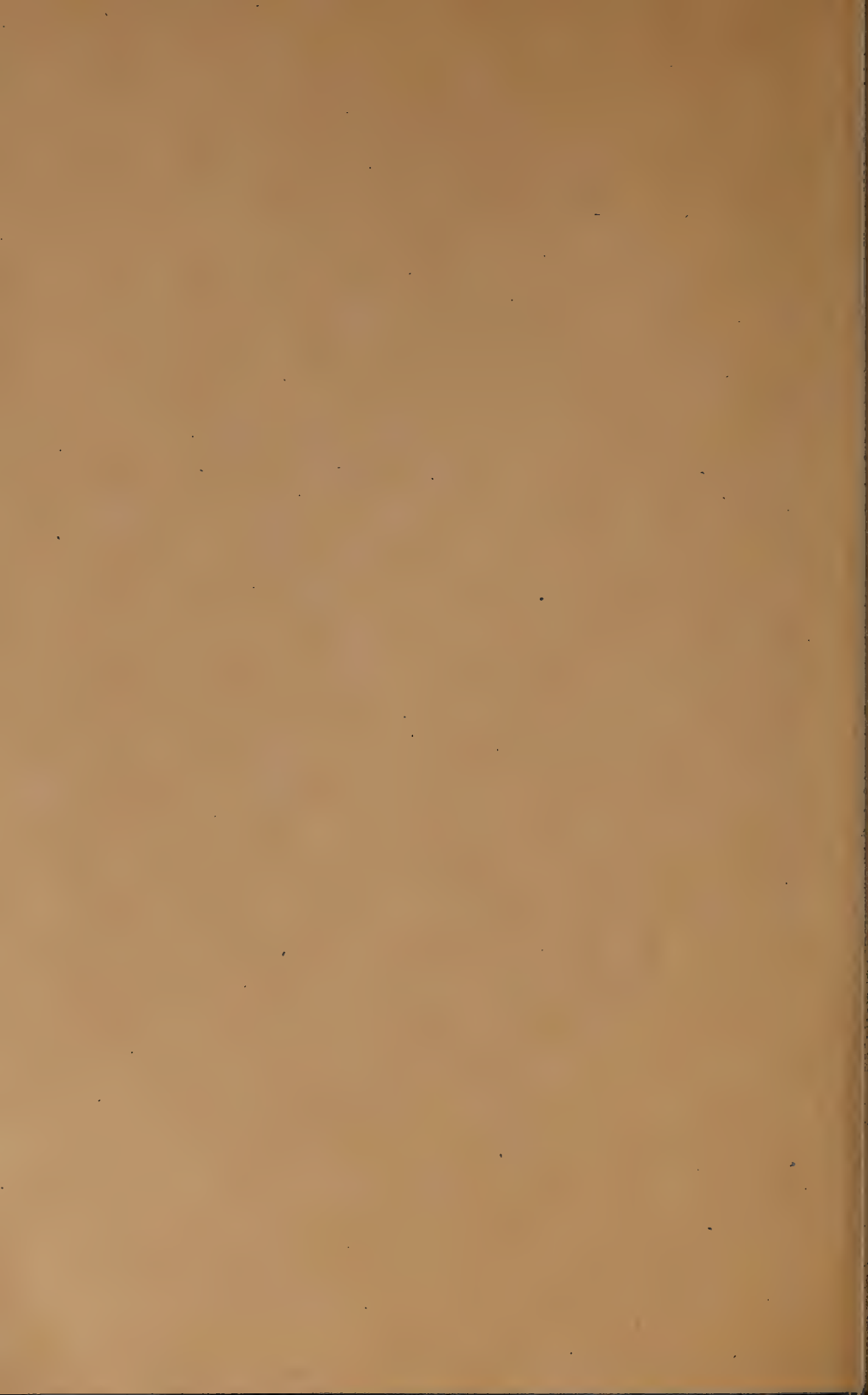
WM. B. PITTMAN,

Attorneys for Plaintiff in Error.

FILED

FEB 1 1918

F. B. [illegible]



NO. 3099

IN THE UNITED STATES CIRCUIT COURT
OF APPEALS

FOR THE
NINTH CIRCUIT

MELEANA KALEHUA,	}
Plaintiff in Error,	
vs.	
HENRY CLARK,	
Defendant in Error.	}

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF CASE.

This is an action to quiet title under the Hawaiian statute permitting such an action to be brought as an action at law. (Section 2750, Revised Laws of Hawaii, 1915.) The action was brought in the Circuit Court of the First Judicial Circuit of the Territory of Hawaii on the 21st day of September, 1916, and thereafter, on or about the 29th day of September, 1916, an answer of general denial was filed by the defendant, and thereafter, on or about the 2nd day of October, 1916, a stipulation was filed in the Circuit Court wherein it was admitted that plaintiff and defendant had a common source of title; that

plaintiff was a cousin of one, Alexandrina Leihulu, who died intestate on the 23rd day of March, 1914, leaving no children, father or mother, sister or brother, nephew or niece; that prior to her death and on the date set forth in the stipulation, the deceased married Henry N. Clark, the defendant herein. (Transcript of Record on Appeal, pages 24 and 25.)

The said cause came up for trial on the 15th day of February, 1917, in the Circuit Court of the First Judicial Circuit before the Honorable C. W. Ashford, trial by jury having been waived, and at that time proof was made that the plaintiff was the first cousin of the deceased woman commonly known as "Leihulu"; that, by stipulation, it was agreed that the said deceased Leihulu was the owner in fee simple of the land set forth in the complaint.

It was further proved that the plaintiff would be the next of kin of the said deceased, if she had no husband living at the time of her death. (See Transcript of Record on Appeal, pages 56-64.)

The marriage of said deceased to Henry Clark having been admitted by stipulation, the point was made by said plaintiff that the said marriage was invalid for the reason that the said Henry Clark at that time was the husband of another woman, never having been legally divorced, and the records of the alleged divorce between himself and his former wife, Emma H. N. Clark, were offered in evidence. (Transcript of Record on Appeal, pages 35-55.) The Cir-

cuit Judge held that, in view of the decision of the Supreme Court of Hawaii in the case of the *Estate of Clark*, 23 Haw. 451, that the marriage of Clark to the deceased was a legal one and that he was legally her husband, and the bill of the plaintiff be dismissed. From this decision a writ of error was sued out in the Supreme Court of the Territory of Hawaii by the plaintiff, and the Supreme Court on the 1st day of June, 1917, affirmed the decision of the circuit judge. From this decision, plaintiff in error appeals to this Court.

ARGUMENT.

The plaintiff assigns the following errors in the decision of the Supreme Court of the Territory of Hawaii and presents argument upon both points:

1. That the Court erred in deciding that the divorce of *Emma H. N. Clark vs. Henry Clark*, who it is admitted is the defendant in error, being Divorce No. 4304, was a good and valid divorce, and that said Henry Clark was therefore able to legally marry Alexandrina Leihulu and, by said marriage, was her sole heir at law.

2. That the Court erred in rendering its decision against plaintiff in error and in favor of defendant in error, and further rendering judgment dismissing the complaint of the plaintiff in error and denying that she was the heir at law of Alexandrina Leihulu.

It is admitted, by stipulation and by the testimony

adduced at the trial and not contradicted, that the plaintiff is the nearest heir at law of the deceased, commonly known as Leihulu, if, at the time of her death, there was no husband living. (Section 3246, Revised Laws of Hawaii, 1915.)

It seems that deceased and Henry N. Clark were married on the 6th day of August, 1912, in San Diego, California, and that the deceased died intestate on March 23, 1914. (Transcript of Record on Appeal, pages 24 and 25.) Prior to this time the said Henry N. Clark had been the husband of one, Emma H. N. Clark, who brought suit for divorce against him on the 2nd day of August, 1911, in the Circuit Court of the First Judicial Circuit, Territory of Hawaii. In this suit for divorce, she alleged a long series of acts of alleged cruelty. (Transcript of Record on Appeal, pages 35-41.) On the 3rd day of August, 1911 (erroneously transcribed as the 3rd day of July, 1911), the defendant in person answered the libel for divorce, admitting the jurisdictional facts and denying the other allegations. On the 8th day of August, 1911, the attorney for Mrs. Clark, R. W. Breckons, filed in the said Circuit Court a consent signed by the libellee that the case should be tried on Tuesday, the 8th day of August, 1911, and on the same date, a decree of divorce was granted the libellant from the libellee, the decree showing that the libellee was not present in court.

It further appears from the testimony in the present case that on the 23rd day of October, 1911,

the decree in this case—among others—was set aside and vacated by Honorable W. J. Robinson, Third Judge of the Circuit Court of the First Judicial Circuit, “for the reason that said decrees, and all thereof, are void and of no force and effect, the same having been entered and rendered in such causes of action prior to the expiration of thirty days from and after service of process or appearance in each of said actions respectively” (Transcript of Record on Appeal, pages 60 and 61), and that thereafter, without any further notice to libellee—there being no record that he was ever apprised that the cause had been re-opened and the record showing that no new summons had been served upon him or any chance been given him to appear—a new decree of divorce was granted on the testimony of the libellant alone and unsupported by any further testimony. (Transcript of Record on Appeal, pages 50-55.)

One cannot escape the fact, from reading the testimony of Mrs. Clark, that the divorce was granted on the flimsiest possible grounds and it was either collusive or arranged in such a manner that the libellee had no opportunity, nor was he summoned to present his side of the case. The very fact that three days after the decree was set aside as void, a new trial was had without notice to the libellee, shows that there was no intention of giving to the case such an examination as should be insisted upon in any matter such as divorce, where not only the

rights of the parties are to be adjudicated, but in which the public have a right to be protected. Under the laws of the Territory of Hawaii, "if there be any reason to suspect collusion or that important testimony can be procured which has not been produced, it shall be the duty of the judge to continue the cause from time to time while such reason for suspicion continues, and the attorney general or other prosecuting officer and parties not of record shall be heard, to establish the fact of collusion or the existence of testimony not produced." (Section 2933, Revised Laws of Hawaii, 1915.)

In this case there was no opportunity given for any such investigation. After the decree was declared void, no notice was given to libellee. No proceeding was instituted whereby the public or the attorney general could have intervened, and no chance was given for any outside testimony to be heard. These facts are uncontradicted and, if said divorce was irregular and void, as it was held to be (see *Markle vs. Markle*, 20 Haw. 633), then a new action could not have been commenced without notice and, if the second divorce was, therefore, irregularly obtained and void for lack of notice to libellee, the said Clark was not free to marry the deceased and was not the legal husband of deceased, never having been legally divorced from his former wife.

It has, however, been suggested that even if said divorce was void, it is not subject to a collateral attack as to its validity and that the only person who

could take advantage of these irregularities and have the matter re-opened would be the husband, the defendant in the present suit. It is respectfully submitted that this is not so; that where the title of real property is involved in the question of heirship, the plaintiff in this case, who has never been before the court and has never had her rights adjudicated, has the right to bring this matter before the court and to prove that said Clark was not in reality the legal husband of the deceased. This was admitted by the Circuit Judge in his decision when he said: "But it is again objected by the plaintiff that the present plaintiff was in no sense a party to any of those proceedings, neither the proceeding of *Clark versus Clark*, Divorce 4304 in this court, nor was she a party to the proceeding in which the Supreme Court rendered that decision, namely, in the matter of the estate of Alexandrina Leihulu Clark, deceased, and that the decision of the Supreme Court in that case did not foreclose her rights. That is absolutely good law; there can be no fault found with that, and I imagine that the defendants do not claim that her rights were foreclosed by that decision." (Transcript of Record on Appeal, page 30.)

If the court is correct in stating that our rights were not foreclosed, plaintiff had a right to present them in an action to quiet title and, as the evidence is undisputed and the proof shows that the allegations in said complaint are correct and that plaintiff is the heir at law on account of the invalidity of the

divorce granted Clark before his marriage to deceased, then judgment should be rendered for the plaintiff in error.

Respectfully submitted,

LORRIN ANDREWS,

WM. B. PITTMAN,

Attorneys for Plaintiff in Error.

Dated, Honolulu, T. H.,

January 30, A. D. 1918.

United States Court of Appeals

FOR THE
NINTH CIRCUIT

MELEANA KALEHUA,

Plaintiff-in-Error,

vs,

HENRY CLARK,

Defendant-in-Error.

BRIEF OF DEFENDANT IN ERROR

*Upon Writ of Error to the Supreme Court of the
Territory of Hawaii*

ANTONIO PERRY,

C. A. LONG,

NOA W. ALULI,

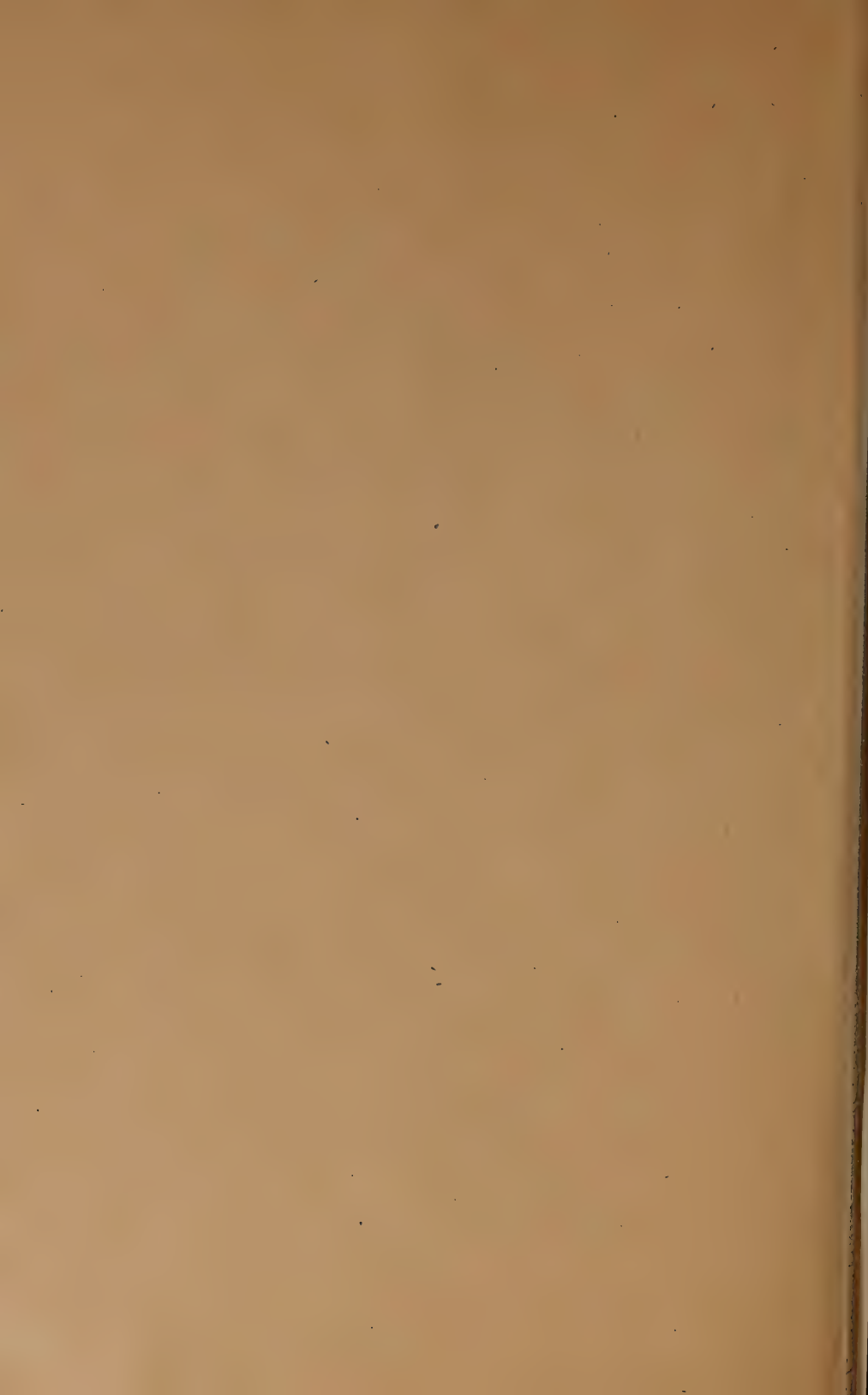
Attorneys for Defendant-in-Error.

Filed this.....day of.....,
1918.

F. D. MONCKTON, Clerk,

By....., Deputy Clerk.

FILED
FEB 14 1918



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United States Court of Appeals

FOR THE NINTH CIRCUIT

MELEANA KALEHUA,

Plaintiff-in-Error,

vs.

HENRY CLARK,

Defendant-in-Error.

BRIEF OF DEFENDANT-IN-ERROR.

*Upon Writ of Error to the Supreme Court of the
Territory of Hawaii*

I.

STATEMENT OF FACTS.

a. In October of 1910, defendant-in-error married Emma Dreier. They lived continuously in Honolulu, where they separated and last lived as husband and wife in July, 1911. (Record, p. 36.)

b. August 2, 1911, Emma Dreier Clark filed a libel of divorce, charging defendant-in-error with "extreme cruelty" and "failure to support." On the following day, the libel and summons were served, and defendant-in-error filed his answer, admitting all of the allegations, excepting the "ill-treatment" and the

“failure to support.” (Record, pp. 36-37, 38, 39, 40, 41.)

c. August 8, 1911, six days after service, trial was had, and the decree (“first decree”) of divorce was rendered on the same day by Circuit Judge Robinson. (Record, pp. 46, 47.)

d. On October 19, 1911, the Supreme Court of Hawaii, in *Markle v. Markle*, in accordance with amended Section 2230 of the Revised Laws of Hawaii, to-wit: “The judge shall not entertain jurisdiction of the libel until at least thirty days after service shall have been completed,” held, that “Circuit judges are without jurisdiction to hear or determine divorce cases until the expiration of thirty days after the completion of service of summons on the libellee, in whatever method service may be accomplished, or after appearance without service.” (Revised Laws of Hawaii 1905, as amended by Act 25, Session Laws 1909. *Markle v. Markle*, 20 Haw. 633, 634, 635.)

e. On October 23, 1911, Judge Robinson, complying with the decision of the said Markle case, ordered the decrees in the hundred or more divorce cases which he had heard and rendered decrees before the expiration of the “thirty days after service,” including the Clark case, set aside. (Record, pp. 60, 61, 62.)

f. On October 26, 1911, more than thirty days after service on defendant-in-error, Judge Robinson retried said Clark case, and on the same date granted the divorce and signed the “second decree.” (Record, pp. 48-49.)

Jurisdictional allegations were duly proven in the second trial. "Second decree" perfect—no jurisdictional defect. (Record, pp. 50, 51, 52, 53, 54, 55.)

g. On August 6, 1912, over one year after the "second decree," defendant-in-error married Alexandrina Leihulu Keohokalole, owner of the lands herein. (Record, p. 24.)

h. On March 23, 1914, she, Alexandrina Leihulu Clark, died, leaving no issue, father, mother, brother, sister nor descendants of any deceased sister or brother. She died intestate and left surviving her said defendant-in-error. (Record, pp. 24, 25.)

i. In August, 1916, in the Matter of the Estate of said Alexandrina Leihulu Clark, in 23 Haw. 451, where the "second decree" was attacked, the Supreme Court of Hawaii held: "A decree of divorce rendered by a court having jurisdiction of the subject matter and of the parties cannot be collaterally attacked for errors or irregularities; that libellee is not notified of the time of the second trial, the original decree having been vacated, is not such a jurisdictional defect as will render the second decree void.

* * * Where a decree in a suit for divorce is vacated because thirty days had not elapsed after the completion of service of summons on the libellee, it is proper for the court to treat the suit as still pending and re-try the same, after the expiration of the thirty days limited by statute, upon the evidence then adduced." (Record, pp. 68, 69, 70, 71, 72, 73, 74, 75.)

j. In September, 1916, after the decision in the

said estate matter, the plaintiff-in-error filed her complaint. Defendant-in-error filed his answer of general denial and waiver of jury trial. (Record, pp. 12-23.)

k. In October, 1916, the parties herein stipulated that said Alexandrina Leihulu Clark, deceased, was the owner of said lands; that she married defendant-in-error on August 6, 1912; that she died intestate on March 23, 1914, leaving the said defendant-in-error, and leaving no issue, father, mother, brother or sister or nephew or niece. (Record, pp. 24-25.)

l. On February 14, 1914, this cause was heard by Circuit Judge Ashford.

For the plaintiff-in-error to succeed, the "second decree" had to be attacked and set aside, in order, to make out, that there was no valid divorce between defendant-in-error and his first wife (Emma Dreier), so that defendant-in-error could not be the lawful husband of Alexandrina Leihulu Clark—so that Clark could not inherit, could not be the sole heir of his wife. Plaintiff-in-error then offered Record No. 4304, of the Clark case, in order to attack said "second decree."

Defendant-in-error objected to its introduction, because it could not be collaterally attacked, by a stranger, and that the said decree had been held by the Territorial Supreme Court to be valid.

The court admitted the said Record. (Record, pp. 55, 56, 57, 58, 59, 60, 61, 62, 63, 64.)

m. To show why and how the "second decree" was

made and entered, defendant-in-error offered, which was allowed without objection, the Clerk's minutes, showing the order of Judge Robinson setting aside the "first decree"—showing the reason for the order, namely, that said "first decree" was void in that he (Judge Robinson) had no jurisdiction to hear before the expiration of the thirty days after service—further showing the second hearing and the rendering of the "second decree." (Record, pp. 59, 60, 61, 62.)

n. Judge Ashford then found for the defendant-in-error, holding that the "second decree" was good and valid and that he was the sole heir of his wife, following the decision in the matter of the Estate of Alexandrina Leihulu Clark, Deceased. (Record, pp. 29, 30, 31, 32, 33, 34.)

o. Plaintiff-in-error appealed from the decision of Judge Ashford and the Supreme Court of Hawaii sustained the trial court, confirming its decision in *Estate of Clark*, supra. (Decision. Record, pp. 65, 66, 67.)

p. From said decision, plaintiff-in-error appealed to this Honorable Court, contending that said "second decree" is void and of no effect. (Record, pp. 78-79.)

q. The laws of descent of Hawaii is as follows: "If the intestate shall leave no issue nor father, mother, brother or sister, nor descendants of any deceased brother or sister, the estate shall descend to the intestate's widow, if any, or in case the intestate be a woman, to the husband, if any." (Revised Laws of Hawaii, 1905, Section 3246.)

r. The Revised Laws of Hawaii, in divorce, does not state that the time or notice of hearing be given a libellee. (Revised Laws of Hawaii 1905, Chapter 167.)

II.

THE QUESTIONS ARE:

Was the "second decree" legally rendered? Can it be collaterally attacked?

Should this Honorable Court decide the said decree valid and/or that it cannot be collaterally attacked, then Henry Clark, libellee in said divorce case and defendant-in-error herein, was the legal husband of Alexandrina Leihulu Clark, and under the stipulation and according to the laws of Hawaii, he was and is the sole heir of her estate and to the lands herein involved.

III.

BRIEF OF THE ARGUMENT.

1. A court has the inherent right to set aside its void decree, and when it so acts, the libel, summons and other pleadings on file, do not thereby become useless or void.

2. Where the statute require, in a divorce suit, that thirty days must expire after service had been made upon the libellee, before the court could assume jurisdiction, and where the court heard a case before that time had expired, the libel and summons are still good and valid, and that upon a second

hearing after the thirty days after service had expired, the "second decree," based upon the same libel and summons, is good, valid and legal.

3. Where the statute does not require that a notice of the time of hearing be given the libellee, a decree rendered without such notice is good, valid and legal.

4. A divorce decree valid upon its face cannot be collaterally attacked, when there is no jurisdictional defect and when the court had jurisdiction, by personal service, over the libellee. An injured spouse may by direct proceedings only, but a stranger, never by direct or collateral proceedings.

IV.

ARGUMENT.

1. INHERENT RIGHT OF COURT TO SET ASIDE ITS VOID DECREE.

Hearing and decree was had and entered six days after service on the defendant-in-error in the Clark case, and then came the Markle decision holding that thirty days after service must elapse before the court could assume jurisdiction. Circuit Judge Robinson, who had rendered the decree, complying with the said decision, formally ordered it set aside.

Judge Robinson had the inherent right to set aside the said decree, for it was void and of no effect for want of jurisdiction to hear.

"The power to vacate, open, or set aside a judgment is a common-law power inherent in courts of

general jurisdiction and may be exercised without the grant of special statutory authority."

23 Cyc. 889.

"The authority to vacate or set aside judgments is incident to all courts of record." "The power to vacate a judgment must be exercised by the court which rendered the judgment."

23 Cyc. 890-1.

2. "FIRST DECREE" VOID AS JUDGE ROBINSON HAD NO JURISDICTION TO HEAR UNTIL THE THIRTY DAYS AFTER SERVICE HAD EXPIRED, "SECOND DECREE" VALID BEING RENDERED AFTER THIRTY DAYS AFTER SERVICE.

The Supreme Court of Hawaii, in the Markle case, held that the decree rendered therein was void and of no effect, and said, "remanded to the Circuit Judge with instructions to set aside the decree and for further proceedings as might be appropriate." By this expression, said court did not hold that the libel, summons and other pleadings were useless, void and of no effect; nor did it mean that a second hearing or "second decree" could not be held or entered upon the old, original and the then existing pleadings. Said court could not have set aside the libel and summons in the said Markle case, for it did not have the right or jurisdiction to do so, for it did not have anything to do with the said pleadings, for the sole attack was directed at the "decree" and at the court

for assuming jurisdiction before the thirty days after service had expired, which was contrary to the amended Section 2230 of the Revised Laws of Hawaii, and when the jurisdiction of the court was successfully assailed, consequently, that which was based upon said void hearing, namely, the said "first decree," was the only pleading effected.

The libel and summons in said Clark case, being still good and valid, for the first hearing was merely a mis-trial, the "second decree" was proper and legal. The first decree was simply set aside, and left the said parties where they originally were.

"Operation and Effect of Vacating or Opening. Where a judgment is vacated or set aside, it is entirely destroyed and the rights of the parties are left as if no such judgment had ever been entered." "It leaves the action still pending and undetermined and justifies further proceedings therein."

23 Cyc. 973, 974.

Also,

Kelly v. Harrison (Miss.), 12 So. 261, 262.

Estate of Clark, 23 Haw. 451, on page 456.

3. HAWAIIAN STATUTES, IN DIVORCE, DO NOT REQUIRE THAT TIME OF HEARING BE GIVEN LIBELLEEE (DEFENDANT-IN-ERROR).

It is not necessary that notice of the time of hearing should have been given to the libellee (defendant-in-error).

The statute does not provide that notice be given.

"In the absence of statute providing otherwise,

the parties to a cause where the court has properly obtained jurisdiction over them are not entitled to a notice of the trial, or of fixing a day for trial."

38 Cyc. 1271.

"In this Territory there is no statute requiring the giving of notice of trial."

Estate of Clark, 23 Haw. 455.

4. COURTS DO NOT, UPON COLLATERAL ATTACK, WHERE NO JURISDICTIONAL DEFECT, SET ASIDE A DECREE VALID UPON ITS FACE.

The "second decree," upon its face, is valid. The transcript of the lower court conclusively shows that jurisdictional allegations were proven.

The objections by a stranger to the records that a second hearing or "second decree" in said divorce case could not be heard or rendered upon the original pleadings and that no notice of the date of hearing was given to Clark, if good, which we do not admit, were and are not jurisdictional defects or objections.

The trial court, having jurisdiction over the subject matter and it having obtained jurisdiction by personal service over the person of defendant-in-error, we submit that the fact that the "first decree" was void and the fact that no notice of hearing was given, did not divest the trial court of its jurisdiction theretofore acquired.

There being no jurisdictional defect, said decree cannot be collaterally attacked—cannot be collaterally attacked by a stranger.

"A decree of divorce rendered by a court having jurisdiction of the subject matter and of the parties cannot be collaterally attacked for errors or irregularities; that libellee is not notified of the time of the second trial, the original decree having been vacated, is not such a jurisdictional defect as will render a second decree void.

"Where a decree in a suit for divorce is vacated because thirty days had not elapsed after the completion of service of summons on the libellee it is proper for the court to treat the suit as still pending and re-try the same, after the expiration of the thirty days, limited by statute, upon the evidence then adduced."

In Re Estate of Clark, 23 Haw. 451.

"Where, however, the court had jurisdiction of the parties and the subject-matter its decree cannot be collaterally attacked because of mere error or irregularity."

14 Cyc. 723.

"It is the duty of the courts to set their faces against all collateral assaults on judicial proceedings."

"A collateral attack on a judicial proceeding is an attempt to avoid, defeat or evade it, or to deny its force and effect in some manner not provided by law."

"An attempt to impeach the decree in a proceeding not instituted for the express purpose of annulling, correcting, or modifying the decree or enjoining its execution."

Van Fleet's Collateral Attack, pp. 3-5.

"Strangers to the divorce suit are not entitled to have an invalid decree of divorce set aside. That right usually exists only in favor of the injured spouse."

14 Cyc. 721.

V.

CONCLUSION.

a. There is no question of fraud or collusion. There is no question of some pre-existing rights of the plaintiff-in-error being affected by said decree. Whatever Emma Dreier Clark and defendant-in-error did in their divorce case was their own concern and it affected their own property rights.

b. Emma Dreier Clark is not attacking the decree. At this late day, a stranger, namely, the plaintiff-in-error, to sustain her cause, is asking to set it aside, not in a divorce matter, where the courts would probably have more patience, but in a land case.

Is the plaintiff-in-error to be permitted to ask Your Honors to make Emma Dreier Clark and defendant-in-error still husband and wife?

c. Has this stranger that interest in the Clark case as to give her a standing to attack collaterally a decree valid upon its face?

The marriage of the defendant-in-error to the owner of the lands herein, is stipulated. It is agreed that defendant-in-error is her sole heir.

We submit that the decisions of the Supreme Court of Hawaii in favor of defendant-in-error be sustained.

Respectfully,

ANTONIO PERRY,

C. A. LONG,

NOA W. ALULI,

Attorneys for Defendant-in-Error.

3100

No.-----

United States ⁹
Circuit Court of Appeals
For the Ninth Circuit.

CELIA DIAMOND and WILLIAM DIAMOND and
BRIDGET McGRAIL and JOHN McGRAIL,
Appellants,

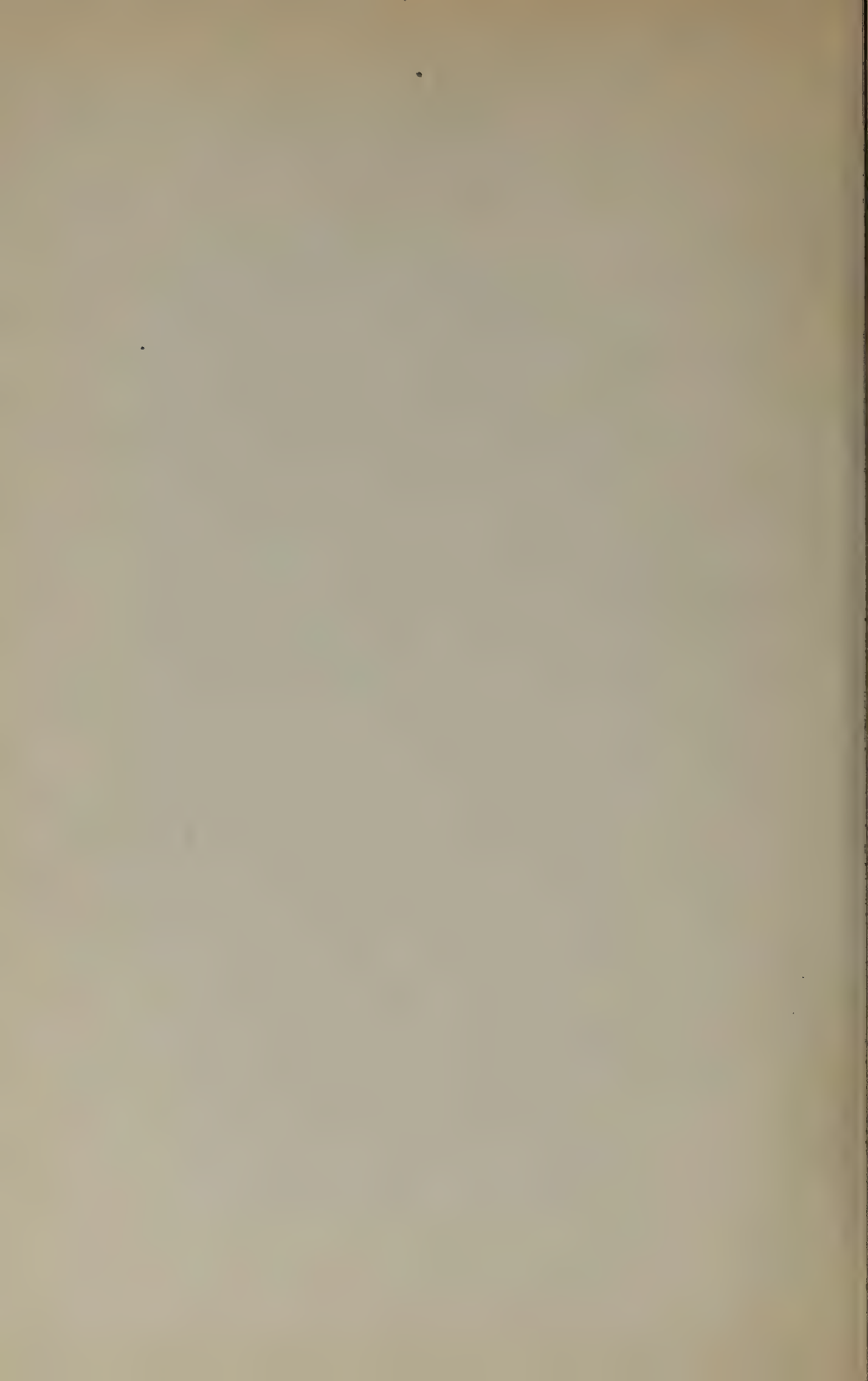
vs.

LAWRENCE F. CONNOLLY, administrator of the
estate of JOHN CORBETT, deceased, and LAW-
RENCE F. CONNOLLY, individually, JOHN J.
CONNOLLY and JOHN E. McBURNEY,
Appellees.

Transcript of the Record

FILED
DEC 18 1917
F. D. MONCKTON
CLERK

*Upon Appeal from the District Court of the United
States, District of Idaho, Northern Division.*



No.-----

United States
Circuit Court of Appeals
For the Ninth Circuit.

CELIA DIAMOND and WILLIAM DIAMOND and
BRIDGET McGRIL and JOHN McGRIL,
Appellants,

vs.

LAWRENCE F. CONNOLLY, administrator of the
estate of JOHN CORBETT, deceased, and LAW-
RENCE F. CONNOLLY, individually, JOHN J.
CONNOLLY and JOHN E. McBURNEY,
Appellees.

Transcript of the Record

*Upon Appeal from the District Court of the United
States, District of Idaho, Northern Division.*

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Appellees.

*In the District Court of the United States, District of
Idaho, Northern Division.*

CELIA DIAMOND and WILLIAM DIAMOND and
BRIDGET McGRAIL and JOHN McGRAIL,
Plaintiffs,

vs.

LAWRENCE F. CONNOLLY, Administrator of the
estate of JOHN CORBETT, deceased, and LAW-
RENCE F. CONNOLLY, individually, JOHN J.
CONNOLLY and JOHN E. McBURNEY,
Defendants.

No. 681.

BILL OF COMPLAINT.

To the Judges of the District Court of the United
States, for the District of Idaho, Northern Divi-
sion :

Plaintiffs Celia Diamond and William Diamond
of the city of Homestead, and residents and citizens
of the State of Pennsylvania, and Bridget McGrail
and John McGrail, of the City of Pittsburgh, and resi-
dents and citizens of the State of Pennsylvania,
brings this, their bill, against Lawrence F. Connolly,
as administrator of the estate of John Corbett, de-
ceased, in Kootenai County, Idaho, and Lawrence F.
Connolly, individually, John J. Connolly and John
E. McBurney, all residents and citizens of the State
of Idaho.

THEREUPON PLAINTIFFS COMPLAIN AND
SAY:

I.

That the plaintiffs Celia Diamond and William Diamond, are now and have been since the year 1889, husband and wife; and the plaintiffs Bridget McGrail and John McGrail, are now and have been since the year 1889, husband and wife; and that all of said plaintiffs, have been for more than fifteen years last past, residents and citizens of the State of Pennsylvania.

II.

That the defendants, Lawrence F. Connolly, John J. Connolly and John E. McBurney, are now and have been for more than ten years last past, residents and citizens of the State of Idaho.

III.

That on the thirtieth day of January, 1907, John Corbett died in Kootenai County, State of Idaho, intestate, leaving an estate therein.

IV.

That on the ninth day of February, 1907, the defendant, Lawrence F. Connolly, filed his petition in the Probate Court of Kootenai County, Idaho, asking for letter of administration on the estate of the said John Corbett, deceased.

V.

That on the twentieth day of February, 1907, the Judge of said Probate Court, duly appointed the said defendant, Lawrence F. Connolly, administrator of the estate of the said John Corbett, deceased, and at the same time exacted a bond of the said Lawrence F.

Connolly, with sureties, in the sum of \$35,000.00 for the faithful performance of his duties as the administrator of the estate of the said deceased.

VI.

That, thereafter, and before receiving letters of Administration on the twentieth day of February, 1907, the said Lawrence F. Connolly, executed a bond to the State of Idaho, signed by himself as principal, and by John J. Connolly and John E. McBurney, as sureties, conditioned that he would faithfully execute the duties of the trust according to law.

VII.

That, thereafter and on the said twentieth day of February, 1907, said bond was duly approved by the Judge of said Probate Court and filed therein, whereupon the said Lawrence F. Connolly, duly qualified, and formal letters of administration on said estate were issued to him, and he immediately assumed the duties of his trust, as the administrator of the estate of said John Corbett, deceased.

VIII.

That on the fourth day of March, 1907, the said Lawrence F. Connolly, acting as administrator of the estate of the said John Corbett, deceased, caused to be filed in the said Probate Court, an Inventory and Appraisement of said estate, setting forth therein the following list of property and its appraised value, to-wit:

Promissory Note, Empire Mill Co.....	\$12,000.00
Open deposit Exchange National Bank, Spokane, Wash.....	900.00

Time deposit Exchange National Bank, Spokane, Wash.	702.70
Open account First Bank, Harrison.....	74.31
Sixty shares Empire Mill Co., Harrison, Idaho	6,000.00
Credit in Empire Mill Co.'s books.....	1,679.97
	<hr/>
	\$21,356.98

IX.

That plaintiffs have been informed and believe, and therefore aver, that the said property mentioned in said inventory and appraisalment, constituted only a portion of the estate of the said John Corbett, deceased, and that the appraisalment thereof was for much less and grossly disproportionate to its real value.

X.

This is a suit of a civil nature, and the matters in dispute between the plaintiffs and the defendants, exceeds the sum or value of three thousand dollars, exclusive of interest and costs, and as the plaintiffs have been informed and believe, and therefore aver, of the value of more than seventy-five thousand dollars.

XI.

That, one Pat Corbett, now deceased, was the grandfather of said Bridget McGrail and Celia Diamond, said plaintiffs, and the father of said John Corbett, deceased.

XII.

That said Pat Corbett was during his life time, twice married; first, to one Julia Price, from which

marital union but one child was born, and named Bridget Corbett.

XIII.

That after the death of said Julia Price, the said Pat Corbett, married one Bridget Connolly, from which marital union was born but two children, namely, Pat Corbett, who died unmarried and without issue in 1893, and the said John Corbett, deceased.

XIV.

That said Bridget Corbett married one Austin Madden, from which marital union was born but nine children.

XV.

That said plaintiffs, Bridget McGrail and Celia Diamond are the daughters of said Bridget Madden, nee Corbett, and Austin Madden, and their only children that are citizens or residents of the United States of America.

XVI.

That the births and marriages mentioned in the five preceding paragraphs, all took place in the County Galway, Ireland, all parties being at the time subjects of the United Kingdoms of Great Britain and Ireland.

XVII.

That the plaintiffs are the neices of the said John Corbett deceased, and were at the time of his death and are now his true and lawful heirs, and as such were and are now, entitled to succeed to the entire

estate left by the said John Corbett, deceased, at the time of his death.

XVIII.

That at the time that the said defendant, Lawrence F. Connolly, presented to the said Probate Court of Kootenai County, State of Idaho, his petition for letters of administration on the estate of said John Corbett, deceased, he represented to the said Court, that William Connolly, John J. Connolly, and himself were brothers, and that Ellen Udell was their sister, and that they were all cousins of said John Corbett, deceased, and his heirs at law, at the time knowing that they were not the next of kin or his heirs at law. That said representations were made with intent to deceive said Probate Court, and to defraud these plaintiffs.

XIX.

That on the second day of August, 1909, said Lawrence F. Connolly, as the administrator of the estate of the said John Corbett, deceased, filed a petition in the said Probate Court of Kootenai County, Idaho, asking for a decree of distribution of said estate, therein falsely representing to said Court, that he, his brothers William Connolly and John J. Connolly, and his said sister, Ellen Udell, were the heirs at law of said John Corbett, deceased; that said representations were made by the said Lawrence F. Connolly, with the knowledge and assent of his brother and sister, and with the intent to deceive the said Probate Court, and to defraud these plaintiffs as the heirs at

law of said John Corbett, deceased, by taking unto themselves the said estate, that in law, equity and right belonged to these plaintiffs.

XX.

That, on the twenty-third day of August, 1909, the said Probate Court of Kootenai County, Idaho, in compliance with the petition mentioned in the last preceding paragraph hereof, and by reason of said false and fraudulent representations in said petition made, made a decree of distribution to the said Lawrence F. Connolly, William Connolly, John J. Connolly and Ellen Udell, in equal portions, what was represented to be, the entire estate of the said John Corbett, deceased, consisting as stated in said decree of distribution of \$19,915.38, cash, lawful mony of the United States of America.

XXI.

That, thereafter, on the twenty-eighth day of June, 1912, the said Lawrence F. Connolly, as the administrator of the estate of the said John Corbett, deceased, distributed and delivered said estate to himself, and John J. Connolly, on the twenty-eighth day of June, 1912, and to William Connolly and Ellen Udell, on the third day of July, 1912, in the proportions in said decree of distribution mentioned, with the full knowledge on the part of each and every of them, that none of them were the next of kin living and residing in the United States of America, or the heirs at law of the said John Corbett, deceased, or rightfully entitled to a share of his said estate.

XXII.

That the reason that said William Connolly and Ellen Udell are not made parties to this action, is because they are not within the jurisdiction of this court, being citizens and residents of the State of Nebraska.

XXIII.

That plaintiffs, Celia Diamond and Bridget McGrail were both born near Clifden, Galway County, Ireland, and their both parents were up to the time of their respective deaths, residents and citizens of said County of Galway, and subjects of the United Kingdoms of Great Britain and Ireland. That their mother, Bridget Madden, was a half sister of said John Corbett, deceased, who was also born near Clifden, County Galway, Ireland. That the parents of the defendant, Lawrence F. Connolly, William Connolly, John J. Connolly and Ellen Udel, lived near Clifden, County Galway, Ireland, and said defendants were born there. That during the early lives of the plaintiffs, defendants and the said John Corbett, deceased, their respective families were well acquainted with each other. They frequently met in a social way, traded at the same market, knew where each other lived, and recognized each other as friends and relatives.

XXIV.

That, in 1887, the plaintiff, Bridget McGrail, then Bridget Madden, moved to Pittsburg, Pa., and in 1889, married John McGrail, a native of Ireland,

who in 1892, became a citizen of the United States, and since said last mentioned date has been a citizen of and resident of Pittsburgh, Pennsylvania.

XXV.

Some three years after the coming of the said Bridget McGrail to the United States, the plaintiff, Celia Diamond, then Celia Madden, also came to Pittsburgh, Pennsylvania, and in 1899, married said William Diamond, a native of Ireland, who in 1897, became a citizen of the United States, and since said time has been a citizen and resident of Homestead, State of Pennsylvania.

XXVI.

That the plaintiffs have made frequent trips to their old home in Ireland, near Clifden, Galway County, since their marriage and becoming citizens of the United States, and have renewed their acquaintance with their old friends, associates and relatives in Ireland, among whom were the relatives of the defendants, Connollys and Udell, and other kin there resident, that were mutually acquainted with the plaintiffs and defendants, Connollys. That on such visits the absent members of said families were usually discussed, and the fact that the plaintiffs lived in the State of Pennsylvania, became well known among relatives, friends and acquaintances in Clifden, County Galway, Ireland, and the further fact that the said defendants, Connollys and John Corbett, deceased, had come to the United States of America, was made known to these plaintiffs.

XXVII.

That, on or about the month of May, 1910, after the said defendants, Lawrence F. Connolly and John J. Connolly, and their brother, William Connolly, and sister, Ellen Udell, had concealed or not made known the death of the said John Corbett, deceased, for a period of three years and three months, from his relatives and next of kin in Ireland, and from his other relatives and next of kin in the United States, and in and about one year after they had procured a decree of distribution from the said Probate Court of his said estate to themselves; the death of the said John Corbett, deceased, was first brought to the knowledge and attention of the plaintiffs, by some neighbors, who brought to them and read an announcement in a newspaper of the death of the said John Corbett, in Idaho. That the plaintiffs immediately procured the assistance of a friend to write to their mother of the death of their uncle, the said John Corbett, each being illiterate and unable to write in person; believing at the time, that their mother was the sole heir of said John Corbett; and have at all times acted on such hypothesis since the death of the said John Corbett was made known to them, until they were informed by Caleb Jones that they were the heirs of said John Corbett, deceased, in their own right, and independent of that of their mother, as is hereinafter alleged.

XXVIII.

That, plaintiffs soon after the death of the said John Corbett was made known to them, called upon

J. W. Davidson, an attorney and counsellor at law, at Pittsburgh, Pennsylvania, and after stating the facts of their relationship, and the fact that their mother was then living in Ireland, asked him if they had any right or interest in the estate of the said John Corbett, deceased, and he informed them that they had not, and could not have any direct interest in said estate, until after their mother's death, and then only through her as her heirs, as they were not the heirs of John Corbett, deceased; and that their mother, Bridget Madden, was the sole heir of John Corbett, deceased, all of which these plaintiffs believed and relied upon.

XXIX.

That, some few months after the death of the said John Corbett, deceased, became known to the plaintiffs, and their mother and other relatives in Ireland, the said Lawrence F. Connolly, while acting in the capacity of administrator of the estate of the said John Corbett, deceased, with one Father Purcell, a Catholic priest, of the county of Kootenai, Idaho, made a trip to Clifden, County Galway, Ireland, and as plaintiffs have been informed and believe, and therefore aver, for the express purpose of procuring an assignment of the right, title and interest of the said Bridget Madden in and to the estate of the said John Corbett, deceased; that plaintiffs have been further informed and believe, and therefore aver, that by false and fraudulent representations, and undue influence of the said Lawrence F. Connolly and said Father Purcell, as to the value of the said

estate of the said John Corbett, deceased, the said Bridget Madden, then of the age of about eighty-five years, blind and decrepit, and unable to either read or write, and with a failing understanding of the matters of this world, and a most zealous votary of the Catholic religion, was induced to and did sign, by making her mark, on or about the first day of April, 1911, an instrument conveying her interest in said estate of the said John Corbett, deceased, to the said Lawrence F. Connolly. That said representations were known by the said Lawrence F. Connolly and the said Father Purcell to be false, and were made in an attempt, and with an intent to cheat and defraud the said Bridget Madden, and these plaintiffs, with whose whereabouts in the United States, they were then cognizant of. That said instrument so procured, was, and is insufficient for any purpose, and it failed to convey any right, claim or interest in said estate.

XXX.

That, thereafter on the fourteenth day of March, 1912, proceedings on behalf of the said Bridget Madden were instituted in the United States Circuit Court, of Idaho, by her counsel, Messrs. Elder & Elder, attorneys and counselors at law, at Coeur d'Alene, Idaho, with the object of securing to her the estate of the said John Corbett, deceased, which proceedings were thereafter dismissed without prejudice. That on the twenty-eighth day of May, 1912, proceedings were instituted in the Probate Court of Kootenai County, Idaho, on the behalf of the said Bridget Madden, by her said attorneys, Messrs. El-

der & Elder, with the ultimate object of establishing her right to succeed to the estate of the said John Corbett, deceased. That in connection with said proceedings and in the course thereof, the Supreme Court of Idaho, on the twenty-third day of May, 1912, determined, that, Bridget Madden never had, and did not have any right, title or interest, in the estate of the said John Corbett, deceased; said decision being reported under the title of *Connolly vs. Reed*, 22 Idaho 29, 125 Pac. 213. That soon after said determination by the Supreme Court of Idaho, proceedings were instituted in the District Court of the State of Idaho, in and for the County of Kootenai, by the Attorney General of the State of Idaho, and the said Elder & Elder, then looking after the interest of the said Bridget Madden, for the purpose and object of having the estate of the said John Corbett, deceased, escheated to the State of Idaho; that said last mentioned proceeding was finally determined by the Supreme Court of Idaho, on the twenty-fifth day of October, 1913, adversely to the contentions of the said Attorney General and Messrs. Elder & Elder, and adversely to the interest of the said Bridget Madden, the mother of these plaintiffs, Celia Diamond and Bridget McGrail. Said decision being reported under the title of *Connolly vs. Probate Court*, 25 Idaho 35, 136 Pac. 205.

XXXI.

That, on or about the ninth day of December, 1912, plaintiffs consulted one Arthur Schmidt, an attorney and counselor at law, at Pittsburgh, Pennsylvania, as

to their right in the estate of said John Corbett, deceased, and in behalf of the plaintiffs, the said Schmidt took the matter up with Messrs. Elder & Elder, attorneys at law, at Coeur d'Alene, Idaho, by letter, they being at the time familiar with the facts of the plaintiffs' relationship to the said John Corbett, deceased, and their residence in the United States, and all other facts pertinent to the inquiry, and was by them informed through the said Arthur Schmidt, that they had no right personally and were not the heirs of the said John Corbett, deceased; and the said Arthur Schmidt personally concurred in the statement, that their mother was the only heir at law of the said John Corbett, deceased, and that anything that they might get from the estate of the said John Corbett, deceased, would come through their mother as her heirs. That if their mother died they would succeed to her interest, right or estate in the property of the said John Corbett, deceased, along with their brothers. All of which these plaintiffs fully believed and relied upon.

XXXII.

That, on or about the twenty-fifth day of October, 1911, plaintiff, Bridget McGrail, received a letter from Henry G. Connolly, of the firm of R. J. Connolly & Son, Solicitors, located at Clifden, County Galway, Ireland, informing her that said Bridget Madden, her mother, was the said John Corbett's "sole next of kin and heiress at law him surviving," which plaintiffs fully believed and relied upon.

XXXIII.

That, neither of these plaintiffs have acquired any of the elements of a school education, and cannot read or write. That they placed complete reliance and implicit confidence, on the representations made to them by the said J. W. Davidson, Arthur Schmidt, Robert Elder of the firm of Elder & Elder, Henry G. Connolly, all men whom they believed to be learned in the law, and even more conversant from investigations conducted with the real facts than they themselves.

XXXIV.

That, in discussing their rights and interest in the estate of the said John Corbett, deceased, after they had learned of his death, with friends and acquaintances who were intelligent and who possessed a school education, and in whose ability and integrity they had respect and confidence, they were repeatedly informed and told that they could have no interest in the Corbett estate while their mother lived, as she alone was the next of kin and entitled to the estate; and plaintiffs believed such statements in connection with and confirmatory of the statements of said attorneys and counselors at law.

XXXV.

That, pending the litigation and efforts made in behalf of their mother, Bridget Madden, to secure the estate of said John Corbett, deceased, these plaintiffs took great interest therein and did all in their power to further the interest of their mother.

XXXVI

That, on the twenty-sixth day of August, 1914, the said Bridget Madden died, at her old home near Clifden, County Galway, Ireland. That a very short time previous to her death these plaintiffs were informed that the courts in Idaho had denied her any right or interest in the estate of the said John Corbett, deceased.

XXXVII.

That, within a few months after the death of the said Bridget Madden, plaintiffs again took up the matter of their interest in the estate of John Corbett, deceased, with the said J. W. Davidson, and were again informed that they had no right in or to the estate of the said John Corbett, deceased, from the fact and for the reason that the Supreme Court of the State of Idaho had determined on two occasions that their mother, Bridget Madden, had no right, and since she had no right they could have no right.

XXXVIII.

That, along about the first of the year, 1916, plaintiffs went to Bradley McK. Burns, an attorney and counselor at law, at Pittsburgh, Pennsylvania, and imparted to him all the facts in the case then understood by plaintiffs, and he undertook to investigate the matter in their behalf, which he did, and in so doing, wrote a number of letters, among which was one to Mr. C. Redman Moon, of St. Anthony, Idaho, an attorney and counselor at law, about the said Corbett estate, which letter was referred by the said Mr.

Moon to Mr. Caleb Jones, attorney and counselor at law, at Spokane, Washington. That Mr. Bradley McK. Burns informed them that he feared that their cause was hopeless. That after a number of letters had passed between the said Bradley McK. Burns and the said Caleb Jones a rumor came to plaintiffs, which they were unable to trace or verify, to the effect, that the said Connollys, defendants herein, had destroyed the last will and testament of the said John Corbett, deceased, which by its terms made the said Bridget Madden, his sole heir. This information was taken to the said Bradley McK. Burns, and he then informed plaintiffs that it would be necessary for him to make a trip to Idaho, and to Nebraska, in order to get exact information as to the present status of the Corbett estate, and other facts in connection with the matter that might be beneficial to the said plaintiffs as the heirs of Bridget Madden, deceased. That if he did not do it himself, he advised that some one qualified should do so at once.

XXXIX.

That on or about the tenth day of August, 1916, plaintiffs left their homes in the State of Pennsylvania, and came to Spokane, Washington, and procured the services of Mr. Caleb Jones, an attorney and counselor at law, to go with them to Coeur d'Alene, Idaho, having traveled from their homes a distance of two thousand eight hundred miles, to make an investigation of the court records at Coeur d'Alene, Idaho, and other matters pertaining to and concerning the

estate of the said John Corbett, deceased. That, plaintiffs with Mr. Jones made an investigation of the court records as aforesaid, on or about the fifteenth day of August, 1916, and these plaintiffs were then for the first time informed that the estate of the said John Corbett, deceased, was no longer under the control of the court, and that it had been distributed to the said Lawrence F. Connolly, John J. Connolly, William Connolly and Ellen Udell.

XL.

That, after the investigation of the said court records at Coeur d'Alene, Idaho, and on the same day plaintiffs returned to Spokane, Washington, and employed Mr. Jones to investigate and advise them what if any interest they had in the estate of the said John Corbett, deceased, as the heirs of said Bridget Madden, deceased. He undertook an investigation of the matter, and within the course of a week informed them, that in his judgment, there was no chance to recover any of the assets of the Corbett estate, as representatives of their mother, for she had no right in the beginning at the time of the death of John Corbett, and failed to initiate one within the time prescribed by the statutes of Idaho; but further advised them, that in his judgment, without making further investigation of the law and the facts, and without being final, that they were then, and had been since the death of the said John Corbett, his next of kin in the United States, and his heirs, and as such entitled to inherit his estate. That this was the first time, that either of the plaintiffs

were ever informed, or had brought to their knowledge that they were the heirs of said John Corbett, deceased, or that they had any right, title or interest, in and to the estate of the said John Corbett, deceased, by reason of their being the next of kin, in the United States, and residents and citizens thereof at the date of the death of the said John Corbett; and also the first time that they had brought to their knowledge the facts of the alleged fraud of the defendants, Connollys, and their sister, Ellen Udell, on the said Probate Court, and against these plaintiffs.

XLI.

That, plaintiffs then formally employed the said Caleb Jones, as their attorney and counselor at law, with full power to make settlement of the matter with the said Connollys and their sister, Ellen Udell, in or outside of the courts, and with or without any legal proceeding, and with the understanding that he make such further investigation of the law and the facts, and to employ or associate with him such additional counsel as he thought proper; and, if after such further investigation he felt confirmed in his judgment of the rights of plaintiffs as the heirs of said John Corbett, deceased, he was to proceed as their attorney and counselor and in their behalf commence such legal proceedings as he deemed necessary, and in such court or courts as to him seemed proper.

XLII.

That, the said Caleb Jones, in pursuance of said agreement, did on the twenty-first day of August,

1916, write to the defendant, Lawrence F. Connolly, a letter, stating therein the claims of the plaintiffs, and inviting a settlement or adjustment thereof without the interposition of the courts, to which no reply was made.

XLIII.

That, thereafter, on the eleventh day of September, 1916, these plaintiffs, by their attorney, Caleb Jones, submitted the question of their rights as the heirs of the said John Corbett, deceased, to Messrs. Graves, Kizer & Graves, a very reputable firm of lawyers, in the city of Spokane, State of Washington, and was by them finally advised on the second day of October, 1916, that Bridget Madden possessed a right, but since her right had been foreclosed both by reason of failure to assert it within the statutory time and bar of the judgment against her, it foreclosed all those in privity with her, and that the plaintiffs are in privity with her.

XLIV.

That, thereafter on or about the tenth day of October, 1916, the same question submitted to the said Messrs. Graves, Kizer & Graves, was submitted to Messrs. Voorhees & Canfield, another reputable and distinguished firm of attorneys and counselors, at Spokane, Washington, who on the seventh day of March, 1917, after careful consideration, advised said Caleb Jones, that they had gone very thoroughly into the various questions involved and considered plaintiff's claims in the premises meritorious.

XLV.

Therefore, plaintiffs allege that the foregoing narration of the facts and circumstances effecting plaintiff's lack of action in the past in relation to the assertion of their own direct claims to the estate of the said John Corbett, deceased, constituted impediments to the earlier prosecution thereof.

XLVI.

That, on the twenty-fourth day of March, 1917, plaintiffs, by their attorney, Caleb Jones, made written demand on the said Lawrence F. Connolly, as the administrator of the estate of said John Corbett, deceased, and upon his individually, for the property heretofore distributed to him, belonging to the estate of said John Corbett, deceased, and that came to his possession as the administrator of said estate, together with its issues and profits, and demanded an accounting of all of said property; and also made a like and separate demand upon John J. Connolly, for the property distributed to him from the estate of the said John Corbett, deceased, and for an accounting thereof, and of its rents, issues and profits; to which demands no attention has been paid, or response made to plaintiffs.

XLVII.

All of which doings and pretenses of the said defendants are contrary to equity and good conscience, and tend to the manifest wrong, injury and oppression of plaintiffs in the premises, and by the strict rules of the common law, can only have relief in a

court of equity, where matters of this nature are properly cognizable and relievable.

And to the end that the said Lawrence F. Connolly, as the administrator of the estate of John Corbett, deceased, and for himself personally, and the defendant, John J. Connolly, and the defendant, John E. McBurney, may full, true and direct and certain answers make according to their knowledge, information and belief, to all and singular the matters and charges aforesaid, but not on oath, their answers on oath being expressly waived, plaintiffs pray as follows:

1. That they be adjudged and decreed to be the true and lawful heirs of the said John Corbett, deceased, and as such entitled to succeed to his estate in equal portions.

2. That each of the said defendants, except the defendant, John E. McBurney, be adjudged and decreed to be the trustees of plaintiffs, of and to the extent of all the property by each received, from the estate of the said John Corbett, deceased, whether by order, judgment or decree of the Probate Court of Kootenai County, Idaho, or otherwise.

3. That the said defendant, Lawrence F. Connolly, as the administrator of the estate of said John Corbett, deceased, and individually, and that the said John J. Connolly, and each of them, be required to discover and set forth a full, true, and particular account of all and singular the property, estate and effects of the said John Corbett, deceased, and each and every part thereof, which has been possessed by, or

come to, the hands of the said defendants, or either of them, or the hands of any other person or persons by their, or either of their, order, or for their, or either of their, use, together with the issues and profits thereof; with the particular nature, qualities, quantities and true and utmost value thereof, respectively, and how the same and every part thereof has been applied and disposed of, and whether any, and what part thereof, now remains unapplied and undisposed of, together with such other matters as may contribute to show the disposition, amount, extent, value and condition of all of the property and estate of the said John Corbett, deceased.

4. That the said defendant, Lawrence F. Connolly, as the administrator of the estate of said John Corbett, deceased, be required to discover and set forth a full, true and particular account of all and singular the property, estate and effects, of the said John Corbett, deceased, and of each and every part thereof, which has been possessed by, or come to, the hands of said defendant, or to the hands of any other person or persons by his order, or for his use, together with the issues and profits thereof; with the particular nature, qualities, quantities and true and utmost value thereof, and every part thereof, respectively, and how the same and every part thereof has been applied and disposed of; and whether any and what part thereof now remains unapplied and undisposed of; and that the said defendant may set forth in addition, an account of the debts due from the said John

Corbett, deceased, and the expenses of the administration of his estate.

5. That a judgment and decree be entered against the said John J. Connolly and John E. McBurney, sureties on the said bond of the said Lawrence F. Connolly, as administrator of the estate of the said John Corbett, deceased, in favor of the plaintiffs, up to the amount of their joint and several obligations, mentioned in said bond, and not exceeding the ascertained value of the property, estate and effects of the said John Corbett, deceased, that plaintiffs may be decreed to be entitled to.

6. That, when the several accounts herein mentioned have been rendered, and this Court shall have ascertained the character, kind and amount of the property and estate of the said John Corbett, deceased, and the clear residue thereof to which plaintiffs, as the heirs of the said John Corbett, deceased, were and are now entitled to receive, may be turned over and paid, one part each, of such clear residue; and that separate and several judgments or decrees be rendered against the defendants, in favor of the plaintiffs, for the property, estate and effects distributed to each respectively; together with a judgment or decree for the entire net residue of the estate of said John Corbett, deceased, after deducting all expenses of administration, and just debts due and paid from the estate of said John Corbett, deceased, against the said Lawrence F. Connolly, and directing the turning over and payment to these plaintiffs of such residue in equal parts.

7. That plaintiffs may be further and otherwise relieved in the premises, according to equity and good conscience.

8. May it please Your Honor to grant to plaintiffs the Writ of Subpoena issuing out of and under the seal of this Honorable Court, directed to the said Lawrence F. Connolly, as the administrator of the estate of John Corbett, deceased, and personally, and directed to John J. Connolly and John F. McBurney, commanding each of them by a certain day and under certain penalty to be therein inserted, to be and appear before this Honorable Court and then and there to answer the premises, and to further stand to and abide such order and decree therein as shall be agreeable to equity and good conscience; and should said Ellen Udell or William Connolly come within the jurisdiction of this Court, like process be issued to make them parties to this action; and plaintiffs will ever pray.

CALEB JONES,

Solicitor of Plaintiffs and of Counsel. P. O. address,
620 Paulsen Building, Spokane, Washington.

C. REDMAN MOON,

Associate Solicitor of Plaintiffs. P. O. address, St.
Anthony, Idaho.

Endorsed, filed March 29, 1917.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 681.

ORDER DIRECTING SERVICE OF SUBPOENA.

On application of Mr. Caleb Jones, solicitor for the plaintiffs in the above entitled cause, it is specially ordered and directed that service of the Writ of Subpoena on the defendants in the above entitled cause be made by T. L. Quarles, the sheriff of Kootenai County, Idaho.

Dated this thirtieth day of March, 1917.

FRANK S. DIETRICH, Judge.

Filed March 30, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 681.

IN EQUITY—(ALIAS) SUBPOENA AD RESPONDENDUM.

The President of the United States of America, to Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, and Lawrence F. Connolly, individually, John J. Connolly and John E. McBurney, GREETING:

You and each of you are hereby commanded that you be and appear in said District Court of the United States, at the court room thereof, in Coeur d'Alene, in said district, within twenty days after service hereof, to answer the exigency of a bill of complaint exhibited and filed against you in our said Court, wherein Celia Diamond and William Diamond

and Bridget McGrail and John McGrail are complainants and you are defendants, and further to do and receive what our said District Court shall consider in this behalf and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you the marshal of said district, or your deputy, to make due service of this our Writ of Subpoena and to have then and there the same.

Hereof not fail.

Witness the Honorable Frank S. Dietrich, Judge of said District Court of the United States, and the seal of our said Court affixed at Boise, in said district, this twenty-third day of April, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States the one hundred and forty-first.

(Seal) W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy Clerk.

MEMORANDUM pursuant to Equity Rule No. 12 of the Supreme Court of the United States:

The defendant is required to file his answer or other defense in the above entitled suit in the office of the clerk of said Court on or before the twentieth day after service; otherwise the Complainant's Bill therein may be taken *pro confesso*.

Endorsed, filed on return May 16, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 681.

AFFIDAVIT OF SERVICE.

State of Idaho,

County of Kootenai,—ss.

T. L. QUARLES, being first duly sworn, deposes and says: That he is, and at the several times mentioned herein was a citizen of the United States above the age of twenty-one years and not a party to the above entitled action; that he received the annexed Alias Subpoena Ad Respondendum on the twenty-sixth day of April, 1917, and personally served the same upon John J. Connolly and John E. McBurney, on the eleventh day of May, 1917, by delivering to each of said defendants, personally in the town of Harrison, Kootenai County, Idaho, a true copy of the annexed Subpoena Ad Respondendum, and at the same time I delivered to said defendant, John E. McBurney, a copy of the Bill of Complaint filed in said action.

T. L. QUARLES.

Subscribed and sworn to before me this twelfth day of May, 1917.

(N. P. Seal)

F. W. ESGATE.

Notary Public in and for the State of Idaho, residing
at Coeur d'Alene.

State of Idaho,

County of Kootenai,—ss.

T. L. QUARLES, being first duly sworn, deposes and says:

That he is and at the several times hereinafter

mentioned was, a citizen of the United States, above the age of twenty-one years, and not a party to the above entitled action; that he received the annexed Alias Subpoena Ad Respondendum, in said action on the twenty-sixth day of April, 1917, and personally served the same upon Lawrence F. Connolly as administrator of the estate of John Corbett, deceased, and upon Lawrence F. Connolly, individually, upon the tenth day of May, 1917, by delivering to each of the said defendants, personally, in the city of Harrison, county of Kootenai, State of Idaho, a true copy of the ennexed Alias Subpoena Ad Respondendum; and at the same time delivered to the said defendant, Lawrence F. Connolly, a copy of the Bill of Complaint, filed in said action.

T. L. QUARLES.

Subscribed and sworn to before me, this twelfth day of May, 1917.

(N. P. Seal)

F. W. ESGATE,

Notary Public for the State of Idaho, residing at
Coeur d'Alene, Idaho.

Filed March 30, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 681.

NOTICE OF MOTION TO QUASH AND DISMISS.

To Celia Diamond and William Diamond, and Bridget McGrail and John McGrail, complainants, and to Caleb Jones and C. Redman Moon, solicitors for said complainants:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE THAT Lawrence F. Connolly, sued in the above entitled suit as administrator of the estate of John Corbett, deceased, and individually, and John J. Connolly, defendants in the above entitled suit, appearing specially, solely and only herein for the purpose of this motion, will, by their solicitor, appearing specially, solely and only herein for the purpose of this motion, move the said District Court of the United States at the court room thereof in Coeur d'Alene City, in the county of Kootenai, State of Idaho, on Monday, the twenty-eighth day of May, A. D. 1917, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, to quash and set aside the Alias Subpoena issued in the said suit on the twenty-third day of April, A. D. 1917, directed to said defendants, and to quash and set aside the service of said Alias Subpoena upon the defendant, Lawrence F. Connolly, as administrator of the estate of John Corbett, deceased, and upon said Lawrence F. Connolly, individually, and upon the said John J. Connolly, and the service of said Alias Subpoena upon each of them, and to dismiss the Bill of Complaint in the above entitled suit and said suit, for each of the reasons set forth in the motion of said defendants, Lawrence F. Connolly, sued in the above entitled suit as administrator of the estate of John Corbett, deceased, and individually, and John J. Connolly, which said motion is served herewith and made a part of this notice, and will then and there

submit to said District Court said motion for the decision of said Court thereon.

Said motion will be made upon the papers, files and records of said District Court in the above entitled suit.

C. W. BEALE,
Solicitor for said defendants, Lawrence F. Connolly, sued in the above entitled suit as administrator of the estate of John Corbett, deceased, and Lawrence F. Connolly, individually, and John J. Connolly. Appearing specially, solely and only herein for the purpose of this Motion. Residence and postoffice address: Wallace, Idaho.

(Title of Court and Cause.)

No. 681.

MOTION TO QUASH AND DISMISS.

Comes now Lawrence F. Connolly, sued in the above entitled suit as administrator of the estate of John Corbett, deceased, and individually, and John J. Connolly, defendants in the above entitled suit, appearing specially, solely and only herein for the purpose of this motion, and, by their solicitor appearing specially, solely and only herein for the purpose of this motion, move the said District Court of the United States, upon the papers, filed and records of the said District Court in the above entitled suit, to quash and set aside the Alias Subpoena issued in said suit on the twenty-third day of April, A. D. 1917, directed to said defendants, and to quash and set aside the service of said Alias Subpoena upon the said defendants, Lawrence F. Connolly, as administrator

of the estate of John Corbett, deceased, and Lawrence F. Connolly, individually, and John J. Connolly, and the service of said Alias Subpoena upon each of them, and to dismiss the Bill of Complaint in the above entitled suit, and the said suit, for each of the following reasons, to-wit:

1. That said District Court has no jurisdiction of or over the person of said defendant, Lawrence F. Connolly, sued in the above entitled suit as administrator of the estate of John Corbett, deceased, or of or over the person of said defendant, Lawrence F. Connolly, individually, or of or over the person of any of the defendants in the above entitled suit, or jurisdiction of or over any of said defendants.

2. That said District Court has no jurisdiction of or over the subject matter of the above entitled suit, or of or over any part thereof, or jurisdiction of or over any action or cause of action, or any part thereof, or of or over any matter whatever set forth in the Bill of Complaint in the above entitled suit.

3. That William Connolly and Ellen Udell, mentioned in the Bill of Complaint in the above entitled suit, were not at the time of the commencement of said suit and are not now citizens or residents of the State of Idaho, or citizens or residents of the District of Idaho, and that neither of them was at the time of the commencement of the said suit, or now is a citizen or resident of the State of Idaho, or a citizen or resident of the District of Idaho; but were at the time of the commencement of the above entitled suit and now are citizens and residents of the State of Nebraska,

and each of them is a citizen and resident of the State of Nebraska.

4. That said William Connolly and Ellen Udell are indispensable defendants and parties defendant in the above entitled suit and each of them is an indispensable defendant and party defendant therein, and that a final judgment cannot be made in the above entitled suit without affecting their joint interests and the joint interests of each of them, and that a final judgment cannot be made therein without leaving the controversy in said suit in such a condition that final determination would be wholly inconsistent with equity and good conscience.

5. That the matter in controversy in said suit is not between citizens of different states, or between citizens of the State of Idaho and a citizen or citizens of any other state, so as to give said District Court jurisdiction.

6. That it appears upon the face of the Bill of Complaint in the above entitled suit that the plaintiffs therein are residents and citizens of the State of Pennsylvania, and that the said William Connolly and Ellen Udell are indispensable parties defendant therein and thereto, and that they are not citizens and residents of the State of Idaho, but are citizens and residents of the State of Nebraska, and that said District Court has no jurisdiction of said suit, or of the Bill of Complaint therein, or of the subject matter thereof, or of any of the defendants mentioned in said suit, or of the said William Connolly and Ellen Udell, mentioned in said Bill of Complaint in said suit, or of either of them.

7. That said suit was not commenced in said District Court to enforce any legal or equitable lien upon or claim to any real or personal property within said district of Idaho, where said suit was brought, or to remove any encumbrance or lien or cloud upon the title to any real or personal property within said district of Idaho, where said suit was brought.

8. That said suit was not commenced to enforce any legal or equitable lien upon or claim to any real or personal property whatever, or to remove any encumbrance or lien or cloud upon the title to any real or personal property whatever.

9. That there is no property, real or personal, involved in said suit within the said district of Idaho, where said suit was brought.

10. That said suit was not commenced under or in pursuance of or by authority of the provisions or any provisions of Section 57 of the Judicial Code of the United States; nor is said suit or the subject matter thereof, nor the subject matter of said Bill of Complaint therein, or any part thereof, contemplated by or included within or provided for in the provisions or any provision of said Section 57; nor is said suit or said Bill of Complaint authorized by said Section 57, or by any of its provisions.

C. W. BEALE,

Solicitor for said defendants, Lawrence F. Connolly, sued in the above entitled suit as administrator of the estate of John Corbett, deceased, and Lawrence F. Connolly, individually, and John J. Connolly. Appearing specially, solely and only herein for the

purpose of this Motion. Residence and postoffice address: Wallace, Idaho.

I hereby certify that I believe the above and foregoing Motion well founded in point of law and that said Motion is not interposed for delay.

C. W. BEALE,

Solicitor for said defendants, Lawrence F. Connolly, sued in the above entitled suit as administrator of the estate of John Corbett, deceased, and Lawrence F. Connolly, individually, and John J. Connolly. Appearing specially, solely and only herein for the purpose of this Motion. Residence and postoffice address: Wallace, Idaho.

Service of the within Notice of Motion and Motion, admitted, accepted and received true copies of said Notice of Motion and Motion received and accepted this twenty-first day of May, 1917.

CALEB JONES,

C. REDMAN MOON,

Solicitors for Complainants.

Endorsed, filed May 23, 1917.

W. D. McReynolds, Clerk.

By L. M. Larson, Deputy.

(Title of Court and Cause.)

No. 681.

OBJECTION TO JURISDICTION OF COURT
AND MOTION TO DISMISS FOR WANT
OF JURISDICTION.

Now comes John E. McBurney, one of the above named defendants, appearing specially for the purpose of this motion only by his solicitor, and moves

the District Court of the United States for the District of Idaho, Northern Division, to dismiss the Bill of Complaint in the above entitled action, for the reason and upon the ground that said Court does not have jurisdiction in this action in this:

That it appears that the plaintiffs are non-residents of the State of Idaho and are residents, to-wit, of the State of Pennsylvania, and that it also appears from said Bill of Complaint that Ellen Udell and William Connolly are also necessary and proper parties to this action, and that they received a part of said property and said action cannot be determined without their presence, and said William Connolly and Ellen Udell are as alleged in paragraph twenty-two of said Bill of Complaint, citizens and residents of the State of Nebraska and jurisdiction cannot be had of them herein, and that this court is without jurisdiction to entertain, hear, decide or determine said case as against this defendant.

Wherefore, this defendant moves that this action be dismissed for want of jurisdiction of the Court to entertain said Bill of Complaint.

EZRA R. WHITLA,

Attorney and Solicitor for said Defendant, John E. McBurney.

I hereby certify that I believe the above motion well founded in point of law, and said motion is not made for the purpose of delay.

EZRA R. WHITLA,

Solicitor and Attorney for Defendant, J. E. McBurney.

Endorsed, filed May 29, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 681.

MOTION TO DISMISS.

Without waiving their objection to the jurisdiction of the Court herein, come now Lawrence F. Connolly, sued in the above entitled suit as administrator of the estate of John Corbett, deceased, and individually, and John J. Connolly, defendants in the above entitled suit, and by their solicitor move and each of them by his solicitor moves the said District Court of the United States for the District of Idaho, Northern Division, to dismiss the Bill of Complaint in the above entitled suit and the said suit and each of them for each of the following reasons, to-wit:

1. That said Bill of Complaint in the above entitled suit does not contain facts sufficient to constitute a valid cause of action in equity or a cause of action at all against the said defendant, Lawrence F. Connolly, sued in the above entitled action as administrator of the estate of John Corbett, deceased, or against said Lawrence F. Connolly individually.

2. That said Bill of Complaint in the above entitled suit does not contain facts sufficient to constitute a valid cause of action in equity or a cause of action at all against the said defendant, John J. Connolly.

3. That there is a misjoinder of causes of action in said suit and in said Bill of Complaint in this: That a cause of action for an accounting between the said plaintiffs and said defendants, Lawrence F. Connolly and John J. Connolly, and a cause of action between said plaintiffs and said defendants, Lawrence

F. Connolly and John J. Connolly and John E. McBurney, upon a bond alleged to have been executed by the defendant, Lawrence F. Connolly, as principal, and by the defendants, John J. Connolly and John E. McBurney, as surety.

4. That the cause of action set forth in the Bill of Complaint in the above entitled action for an accounting is barred by the provisions of Section 5627 of the Code of Civil Procedure of the Idaho Revised Codes.

5. That the cause of action set forth in the Bill of Complaint in the above entitled action on the bond set forth therein, is barred by the provisions of Section 5627 of the Code of Civil Procedure of the Idaho Revised Codes.

6. That the cause of action set forth in the Bill of Complaint in the above entitled action for an accounting is barred by the provisions of Section 5666 of the Code of Civil Procedure of the Idaho Revised Codes.

7. That the cause of action set forth in the Bill of Complaint in the above entitled action of the bond set forth therein, is barred by the provisions of Section 5666 of the Code of Civil Procedure of the Idaho Revised Codes.

8. That the cause of action set forth in the Bill of Complaint in the above entitled action for an accounting is barred by the provisions of Subdivision 7 of Section 4831 of the Code of Civil Procedure of the Idaho Revised Codes.

9. That the cause of action set forth in the Bill of Complaint in the above entitled action on the bond set

forth therein is barred by the provisions of Subdivision 7 of Section 4831 of the Code of Civil Procedure of the Idaho Revised Codes.

10. That the cause of action set forth in the Bill of Complaint in the above entitled action for an accounting is barred by the provisions of Section 4834 of the Code of Civil Procedure of the Idaho Revised Codes.

11. That the cause of action set forth in the Bill of Complaint in the above entitled action on the bond set forth therein is barred by the provisions of Section 4834 of the Code of Civil Procedure of the Idaho Revised Codes.

12. That the cause of action set forth in the Bill of Complaint in the above entitled action on the bond set forth therein is barred by the provisions of Subdivision 4 of Section 4054 of the Code of Civil Procedure of the Idaho Revised Codes.

13. That the cause of action set forth in the Bill of Complaint in the above entitled action for an accounting is barred by the provisions of Subdivision 4 of Section 4054 of the Code of Civil Procedure of the Idaho Revised Codes.

14. That the cause of action set forth in the Bill of Complaint on any alleged fraud of Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, is barred by the provisions of Section 5627 of the Code of Civil Procedure of the Idaho Revised Codes.

15. That the cause of action set forth in said Bill of Complaint on any trust relation between the said

Lawrence F. Connolly, as administrator of the estate of John Corbett, deceased, or any of said plaintiffs, is barred by the provisions of Section 5627 of the Code of Civil Procedure of the Idaho Revised Codes.

16. That the cause of action set forth in the Bill of Complaint on any alleged fraud of Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, is barred by the provisions of Section 5666 of the Code of Civil Procedure of the Idaho Revised Codes.

17. That the said cause of action set forth in said Bill of Complaint on any trust relation between the said Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, or any of said plaintiffs, is barred by the provisions of Section 5666 of the Code of Civil Procedure of the Idaho Revised Codes.

18. That the cause of action set forth in said Bill of Complaint on any alleged fraud of Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, is barred by the provisions of Subdivision 7 of Section 4831 of the Code of Civil Procedure of the Idaho Revised Codes.

19. That the cause of action set forth in said Bill of Complaint on any trust relation between the said Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, or any of said plaintiffs, is barred by the provisions of Subdivision 7 of Section 4831 of the Code of Civil Procedure of the Idaho Revised Codes.

20. That the cause of action set forth in the Bill

of Complaint on any alleged fraud of Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, is barred by the provisions of Section 4834 of the Code of Civil Procedure of the Idaho Revised Codes.

21. That the cause of action set forth in said Bill of Complaint on any trust relation between the said Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, or any of the plaintiffs, is barred by the provisions of Section 4834 of the Code of Civil Procedure of the Idaho Revised Codes.

22. That the cause of action set forth in the Bill of Complaint on any alleged fraud of Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, is barred by the provisions of Subdivision 4 of Section 4054 of the Code of Civil Procedure of the Idaho Revised Codes.

23. That the cause of action set forth in said Bill of Complaint on any trust relation between the said Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, or any of said plaintiffs, is barred by the provisions of Subdivision 4 of Section 4054 of the Code of Civil Procedure of the Idaho Revised Codes.

24. That it appears by the plaintiffs' own showing by the said Bill of Complaint that they are not, nor is any of them, entitled to the relief prayed for by the said Bill of Complaint against the defendants, or any of them, for the reason that they are guilty of laches, and each of them is guilty of laches in not sooner asserting their pretended right or claim to

the property as heirs to the property mentioned in said Bill of Complaint, it appearing from said Bill of Complaint that the said plaintiffs were advised as early as August, 1910, of the death of John Corbett, deceased, and of the decree of distribution referred to in said Bill of Complaint, and that the Bill of Complaint is without equity.

Said motion will be made upon the files, records and papers of said District Court in the above entitled suit.

25. That the cause of action set forth in the Bill of Complaint in the above entitled action is barred by the provisions of Section 5627 of the Code of Civil Procedure of the Idaho Revised Codes.

26. That the cause of action set forth in the Bill of Complaint in the above entitled action on the bond set forth therein is barred by the provisions of Section 4052 of the Code of Civil Procedure of the Idaho Revised Codes.

C. W. BEALE,
Solicitor for said Defendants, Lawrence F. Connolly,
sued in the above entitled suit as administrator of
the estate of John Corbett, deceased, and Lawrence
F. Connolly, individually, and John J. Connolly.
Residence and postoffice address: Wallace, Idaho.

I hereby certify that I believe the above and foregoing motion well founded in point of law and said motion is not made for delay.

C. W. BEALE,
Solicitor for said Defendants, Lawrence F. Connolly,

sued in the above entitled action as administrator of the estate of John Corbett, deceased, and Lawrence F. Connolly, individually, and the said John J. Connolly. Residence and postoffice address: Wallace, Idaho.

Endorsed, filed May 29, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 681.

MOTION OF DEFENDANT, JOHN E. McBURNEY, TO DISMISS.

Without waiving objection to the jurisdiction of the Court herein, comes now John E. McBurney, one of the above named defendants, in his own behalf only, by his solicitor, and moves the District Court of the United States for the district of Idaho, Northern Division, to dismiss said Bill of Complaint in the above entitled suit, and each and every part thereof as against this defendant, for the following reasons:

1. That said Bill of Complaint in the above entitled suit does not contain facts sufficient to constitute a valid cause of action, in equity or at law, or any cause of action at all against this defendant.

2. That there is a misjoinder of causes of action in said suit in said Bill of Complaint in this: In that this is a cause of action for an action upon an alleged fraud and for property wrongfully received by the defendants, and Lawrence F. Connolly and John J. Connolly have been joined with a pretended cause of action against this defendant as an alleged surety

upon a bond alleged to have been executed by the defendant, Lawrence F. Connolly, as principal, and by this defendant and John J. Connolly, as sureties, without showing any liability as against this defendant.

4. That the cause of action set forth in the Bill of Complaint in the above entitled action for an accounting is barred by the provisions of Section 5627 of the Code of Civil Procedure of the Idaho Revised Codes.

5. That the cause of action set forth in the Bill of Complaint in the above entitled action on the bond set forth therein is barred by the provisions of Section 5627 of the Code of Civil Procedure of the Idaho Revised Codes.

6. That the cause of action set forth in the Bill of Complaint in the above entitled action for an accounting is barred by the provisions of Section 5666 of the Code of Civil Procedure of the Idaho Revised Codes.

7. That the cause of action set forth in the Bill of Complaint in the above entitled action on the bond set forth therein, is barred by the provisions of Section 5666 of the Code of Civil Procedure of the Idaho Revised Codes.

8. That the cause of action set forth in the Bill of Complaint in the above entitled action for an accounting is barred by the provisions of Subdivision 7 of Section 4831 of the Code of Civil Procedure of the Idaho Revised Codes.

9. That the cause of action set forth in the Bill of Complaint in the above entitled action on the bond set forth therein is barred by the provisions of Subdi-

vision 7 of Section 4831 of the Code of Civil Procedure of the Idaho Revised Codes.

10. That the cause of action set forth in the Bill of Complaint in the above entitled action for an accounting is barred by the provisions of Section 4834 of the Code of Civil Procedure of the Idaho Revised Codes.

11. That the cause of action set forth in the Bill of Complaint in the above entitled action on the bond set forth therein is barred by the provisions of Section 4834 of the Code of Civil Procedure of the Idaho Revised Codes.

12. That the cause of action set forth in the Bill of Complaint in the above entitled action on the bond set forth therein is barred by the provisions of Subdivision 4 of Section 4054 of the Code of Civil Procedure of the Idaho Revised Codes.

13. That the cause of action set forth in the Bill of Complaint in the above entitled action for an accounting is barred by the provisions of Subdivision 4 of Section 4054 of the Code of Civil Procedure of the Idaho Revised Codes.

14. That the cause of action set forth in the Bill of Complaint on a charge of fraud against Lawrence F. Connolly, as administrator of the estate of John Corbett, deceased, is barred by the provisions of Section 5627 of the Code of Civil Procedure of the Idaho Revised Codes, and that any rights of any person to bring an action against said administrator of the estate of John Corbett, deceased, would be barred, and that after said limitation has run no action could

be maintained against this defendant as a bondsman of said Lawrence F. Connolly.

15. That the cause of action set forth in said Bill of Complaint on any trust relation between the said Lawrence F. Connolly, as administrator of the estate of John Corbett, deceased, or any of said plaintiffs, is barred by the provisions of Section 5627 of the Code of Civil Procedure of the Idaho Revised Codes.

16. That the cause of action set forth in the Bill of Complaint on any alleged fraud of Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, is barred by the provisions of Section 5666 of the Code of Civil Procedure of the Idaho Revised Codes.

17. That the said cause of action set forth in said Bill of Complaint or any trust relation between the said Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, or any of said plaintiffs, is barred by the provisions of Section 5666 of the Code of Civil Procedure of the Idaho Revised Codes.

18. That the cause of action set forth in said Bill of Complaint on any alleged fraud of Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, is barred by the provisions of Subdivision 7 of Section 4831 of the Code of Civil Procedure of the Idaho Revised Codes.

19. That the cause of action set forth in said Bill of Complaint or any trust relation between the said Lawrence F. Connolly, administrator of the estate of

John Corbett, deceased, or any of said plaintiffs, is barred by the provisions of Subdivision 7 of Section 4831 of the Code of Civil Procedure of the Idaho Revised Codes.

20. That the cause of action set forth in the Bill of Complaint on any alleged fraud of Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, is barred by the provisions of Section 4834 of the Code of Civil Procedure of the Idaho Revised Codes.

21. That the cause of action set forth in said Bill of Complaint on any trust relation between the said Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, or any of the plaintiffs, is barred by the provisions of Section 4834 of the Code of Civil Procedure of the Idaho Revised Codes.

22. That the cause of action set forth in the Bill of Complaint on any alleged fraud of Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, is barred by the.....

23. That the cause of action set forth in said Bill of Complaint on any trust relation between the said Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, or any of said plaintiffs, is barred by the provisions of Subdivision 4 of Section 4054 of the Code of Civil Procedure of the Idaho Revised Codes.

24. That plaintiffs' Bill of Complaint shows that they have known of the alleged fraud of Lawrence F. Connolly as administrator of said estate for more

than five years prior to the commencement of this action, and that if any fraud was committed they have shown no sufficient reason to excuse themselves for not sooner commencing their action.

25. That the cause of action set forth in the Bill of Complaint in the above entitled action is barred by the provisions of Section 5627 of the Code of Civil Procedure of the Idaho Revised Codes.

26. That the cause of action set forth in the Bill of Complaint in the above entitled action on the bond set forth therein is barred by the provisions of Section 4052 of the Code of Civil Procedure of the Idaho Revised Codes.

27. That the complaint in this action alleges and shows that said Lawrence F. Connolly has complied with all of orders of the Probate Court in the estate of John Corbett, deceased, and that by reason thereof no liability whatever has been or can be imposed upon this defendant as a bondsman or surety for the performance of said duties.

28. That said complaint does not allege, state or show that this defendant was a party to the alleged fraud of Lawrence F. Connolly as administrator, or personally, or on account of an improper division or distribution of said estate, or that he knew anything about the same, or that he is, was or could be in any manner whatever liable therefor.

29. That said Bill of Complaint, as to this defendant, is prematurely brought, and that any right of action whatever would not accrue as against this defendant as surety upon the bonds of Lawrence F.

Connolly, as administrator of the estate of John Corbett, deceased, until some lawful order was made by a court having jurisdiction requiring him as administrator of the estate of John Corbett, deceased, to do or perform some act, and his refusal to comply with such order.

30. That the complaint in this action shows upon its face that the defendant, Lawrence F. Connolly, as administrator of the estate of John Corbett, deceased, complied with the orders of the Probate Court of Kootenai County, Idaho, in the distribution of said estate and has complied with all of the orders of said Court and the courts having jurisdiction, and that by so doing no liability whatever has attached as against this defendant.

This motion will be made and based upon the records and files of this action, and particularly upon the Bill of Complaint filed herein.

EZRA R. WHITLA,
Solicitor for Defendant, John E. McBurney, only.
Residence and postoffice address: Coeur d'Alene,
Idaho.

I hereby certify that I believe the above and foregoing motion well founded in point of law and said motion is not made for delay.

EZRA R. WHITLA,
Solicitor for Defendant, John E. McBurney, only.
Residence and postoffice address: Coeur d'Alene,
Idaho.

Endorsed, filed May 31, 1917.

W. D. McReynolds, Clerk.

*Coeur d'Alene, Northern Division, May 28, 1917,
May Term, First Judicial Day.*

CELIA DIAMOND, *et al.*,

vs.

LAWRENCE F. CONNOLLY *et al.*

CIVIL No. 681.

The defendants' motion to quash and dismiss the complaint was argued before the Court by counsel for the respective parties, whereupon the Court announced his decision and denied the motion upon the question of jurisdiction, without prejudice to the filing of a motion to dismiss upon other grounds, the defendant taking exceptions to the ruling of the Court. *Coeur d'Alene, May 31, 1917, Fourth Judicial Day.*

Counsel for the defendant, John F. McBurney confessed his motion to dismiss the complaint for want of jurisdiction, to be without proper grounds, and asked that the same be denied with permission to file a motion upon other grounds, which was granted by the Court.

Motions to dismiss the complaint were then argued before the Court by counsel for the respective parties, and were by the Court taken under advisement.

(Title of Court and Cause.)

No. 681.

DECISION ON MOTION TO DISMISS.

July 10, 1917.

Caleb Jones, Solicitor for Plaintiffs.

C. W. Beale and E. R. Whitla, Solicitors for Defendants.

Dietrich, District Judge.

The complaint shows that:

The plaintiff, Celia Diamond, is the wife of William Diamond, and Bridget McGrail is the wife of John McGrail. The two women are sisters, and were born in Galway, Ireland, the daughters of Austin Madden and Bridget Madden, his wife. John Corbett, their mother's half-brother, died on January 30, 1907, in Kootenai County, Idaho, where he left a substantial estate. Thereafter the defendant, Lawrence F. Connolly, duly qualified as administrator of the estate, and letters issued to him out of the Probate Court of that county on February 20, 1907. Upon August 2, 1909, he filed a petition praying for a distribution of the estate, "therein falsely representing to said Court that he" and his two brothers, William and John J., and his sister, Ellen Udell, "were the heirs at law of said John Corbett, deceased," such representations being made, so it is alleged, with the knowledge and assent of his brothers and sister, "and with the intent to deceive the said Probate Court and to defraud" the plaintiffs, who were in reality the heirs. Acting upon such petition, and being induced

by the false statements therein contained, the Probate Court, presumably after due notice as prescribed by law, etc., on August 23, 1909, entered a decree distributing the whole of the estate to Lawrence F. Connolly and his co-defendant John J. Connolly, and William Connolly and Ellen Udell, in equal portions. The latter two distributees are not made parties defendant, for the reason, as alleged, that they are beyond the jurisdiction of the Court. The defendants, John J. Connolly and John E. McBurney were sureties on the administrator's bond. Claiming to be the rightful heirs, the plaintiffs seek to charge Lawrence F. Connolly with responsibility for the entire estate, the sureties with responsibility up to the limit of the penalty of their bond, and John J. Connolly, as distributee, up to the amount of the estate received by him. Defendants call into question the sufficiency of the bill by a motion to dismiss. In the view I feel impelled to take of certain controlling questions, it is not thought to be necessary to set forth more in detail the prayer or to discuss the theory upon which plaintiffs assert the right to recover upon the bond or to recover from Lawrence F. Connolly more than his distributive share. Nor is there need to recite in detail the facts and circumstances and the statutory provisions or the principles of general law upon which the claim is predicated that the plaintiffs were at the time the proceedings for distribution were taken entitled to succeed to the whole of the estate. Assuming, without deciding, that the plaintiffs were more closely related to the deceased than the distributees,

and that, after their mother, they were next of kin, and that by reason of their mother's alienage disqualifying her from inheriting, they became the heirs at law of the deceased, not through their mother, but in their own right, are the facts exhibited by the bill otherwise sufficient to entitle them to relief? Three times already the defendant, Lawrence F. Connolly has been drawn into court upon a similar charge of fraud, once in this Court (the case being unreported), and twice in the State courts, as appears from *Connolly v. Reed*, 22 Idaho, 29, and *Connolly v. Probate Court*, 25 Idaho, 35. By assumption there is no privity between the plaintiffs and Bridget Madden, and, therefore, they are not estopped by the judgments entered in these suits carried on by her or upon her behalf. But the statutory proceeding for the distribution of an estate is in the nature of a suit *in rem*, and when taken in compliance with the law the decree, upon becoming final, is deemed to be binding upon all the world. *Connolly v. Reed*, and *Connolly v. Probate Court*, *supra*. There is here no charge of irregularity of procedure, and, therefore, it will be presumed that due notice was given and that generally the law was complied with. It follows that, unless nullified by fraud, the decree foreclosed the claims of all parties, including those of the plaintiffs here. So much, as I understand, the plaintiffs concede, but they say the decree was procured through fraud. What are the facts disclosed by the pleading in this respect, and can the decree be assailed on account thereof? The averments are, that, with the

knowledge and assent of his brothers and sister, the defendant, Lawrence F. Connolly, with the intent to deceive the Court and to defraud the plaintiffs, falsely represented in his petition for distribution that he and his co-distributees were the heirs of the deceased, and that the Court acted upon such representations. There is further statement to the effect that the distributees did not advise Corbett's relatives of his death until about a year after the decree of distribution was made. Such is the extent of the charge of fraud both in scope and in detail. There is no averment that Connolly either represented in the petition or testified before the Court that the deceased left no relatives other than the distributees, or that he made any false statement or concealed any fact touching the existence of the plaintiffs or their relationship to the deceased. The falsity, if any there was, consisted of the claim or representation that the Connollys were the only heirs—not even that they were next of kin of the deceased. A claim or representation of heirship manifestly involves mixed questions of law and fact. The verity of this statement is most strikingly exemplified upon the face of the bill. Bridget Madden repeatedly claimed and pleaded that she was the only heir, and yet the Supreme Court of the State denied her claim, and the plaintiffs now assert that she was not entitled to inherit. Is she, therefore, to be charged with fraud because she repeatedly came into the courts and represented that she was the heir? As the bill further discloses, the plaintiffs repeatedly took legal advice, and

until recently were informed that they were not heirs. They have now come into Court asserting a right to inherit, but should the courts hold against them, would they be chargeable with an attempt to deceive? The illustrations are to the point that a party cannot be subjected to a charge of actionable fraud because in his pleading he may make a claim involving doubtful questions of mixed law and fact. It is true that the plaintiffs further aver that this representation was made by Connolly with the intent to deceive the Court and to defraud the plaintiffs, but in the absence of averments of specific facts from which an inference of a wicked intent may be properly drawn, this language must be held to mean nothing more than that the claim was made with the intent on the part of Connolly to induce the Court to distribute the estate to him and his sister and brothers. There is no charge that he misrepresented any material fact to the Court, or wilfully withheld any information, or resorted to any trick or device, or did anything or left anything undone which it was his duty to do, for the purpose of preventing the plaintiffs from having their day in Court or fully and fairly presenting their claims for adjudication. It is very plain from the diversity of advice given, and from the decisions of the Courts as set forth and explained in the bill, that if all the facts of kinship here exhibited by the bill had been before it, the Probate Court might, with much show of reason, have entered the decree now complained of. Under such conditions we ought not to consider as sufficient, and to entertain for any purpose, a charge

of fraud so general and so barren of circumstantial detail.

But even if it were shown that the Connollys wilfully set forth in the petition for distribution material facts in respect to their relation to the deceased, which they knew to be untrue, for the purpose of securing a decree in their favor, I would still be inclined to regard the bill as insufficient. It must be borne in mind that there is no suggestion of extrinsic fraud, that is, conduct upon the part of the defendants intended to deceive the plaintiffs or to prevent them from having a fair hearing upon their claims in the Probate Court. Such notice of the hearing as the law of the State requires was given, and Connolly made no false or other representation to the plaintiffs. He did nothing to prevent them from presenting their claim or having it considered, nor did he fail in the discharge of any duty which he owed them. The full extent of his wrongdoing, if any there was, consisted of making a contention in open court that he and his brothers and sister were the heirs. Suppose he had gone further and upon the hearing had falsely testified that the deceased left no other relatives at all,—at most we would have a case of intrinsic fraud. And, indeed, that only intrinsic fraud is intended to be charged in the bill is, as I understand, admitted by counsel for the plaintiffs. For present purposes it may be assumed, but it is not decided, that a decree of distribution is not a judgment of exceptional character like the probate of a will. *The Broderick Will Case*, 21 Wall 503. *Stead vs. Curtis*,

191 Fed. 529; s. c., 205 Fed. 439; it will be deemed to stand upon the same footing with ordinary judgments and decrees of courts of record. That is the most favorable view to the plaintiffs which it is possible to take. I further understand that counsel for the plaintiffs here concede what was conceded in the *Stead* case, namely, that it is a universal rule that in the absence of statutory authority equity does not set aside judgments of any kind for intrinsic fraud. *Stead vs. Curtis, supra*, and the cases therein cited. Thus conceding that only intrinsic fraud is charged, and that courts of equity do not exercise jurisdiction to set aside judgments on account thereof, the plaintiffs attempt to distinguish between the exercise of equitable jurisdiction to vacate or nullify a judgment in the technical sense, and the exercise thereof for the purpose of depriving the party profiting by the judgment of all benefit therefrom. But aside from cases of the most exceptional character, courts of equity do not under any conditions possess or attempt to exercise the power of authority to go into a court where the objectionable judgment was rendered and technically vacate the judgment or in any wise modify the record. When granted at all, relief is, as a general rule, given against the party benefited or in respect to the property affected by the judgment. The result is, of course, the same, for there is no substantial difference between vacating a judgment upon the record and nullifying it in effect by denying its validity and taking away from the successful party the entire fruits thereof. There is no basis for the juris-

dictional distinction which the plaintiffs attempt to make. The reason, and substantially the only reason, underlying the rule that courts of equity will not interfere with judgments on the ground of intrinsic fraud alone, is lucidly and tersely stated by Mr. Justice Miller in the leading case of *United States vs. Throckmorton*, 98 U. S. 61, as follows: "That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterward ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases." But such a reason operates quite as cogently against the exercise of equitable jurisdiction to grant the relief here sought as technically to adjudge the decree of distribution void and to vacate it of record. For if we can in this action disregard the probate judgment and divest the distributees of their title, and pass the property to the plaintiffs, another court of equity may, next year, upon representations that our decree was procured by false pleadings and perjured testimony, re-amine the issues, and, if satisfied that false statements were made, take the property from the plaintiffs and return it to the distributees, and so on indefinitely, and we should have the very evil which the rule of the *Throckmorton* case is designed to prevent. Counsel cited, as tending to support the plaintiff's view, *Sohler vs. Sohler* (Cal.), 67 Pac. 282, 285. But that such

is not the doctrine of the California courts even under a statute which would seem to strengthen, if it does not add to, the remedial rights of the aggrieved party, reference need only be made to such cases as *Lynch vs. Rooney*, 44 Pac. 565, and *Mulcahey vs. Dow*, 63 Pac. 158, where the conditions and contentions were very similar to those here presented, and the more recent case of *Bacon vs. Bacon*, 89 Pac. 317, where the Supreme Court of California sums up the doctrine prevailing in that State as follows:

"*Lynch vs. Rooney*, 112 Cal. 282, 44 Pac. 565, was an attempt to review a decree of distribution and declare an involuntary trust, upon a showing that the decree was procured by false or mistaken testimony. The case is one of the class where the fraud or mistake is intrinsic. In such cases no relief can be given. *Pico vs. Cohn*, 91 Cal. 133, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; *U. S. vs. Throckmorton*, *supra*. If the latter part of the opinion in this case was intended to declare that such decrees may not be reviewed for extrinsic fraud in procuring them to be made, it must be considered as overruled by the decision in *Sohler vs. Sohler*, *supra*. In *Mulcahey vs. Dow*, 131 Cal. 73, 63 Pac. 158, the opinion conceded that a distributee may, in a proper case, be held as an involuntary trustee, but decides that the fraud there shown was not extrinsic or collateral." And see also, to the same effect, *Goodrich vs. Ferris* (Cal.), 145 Fed. 844. It is urged that if this view be taken the decisions of some of the high courts will be found to be flatly contradictory one to

the other and certain illustrative cases are cited. A measure of conflict there doubtless is, but when viewed in the light of their facts, and when we consider that very often the unqualified general term fraud is used in referring to what is really extrinsic fraud, the cases cited as examples do not present serious difficulty. While the points we have been discussing are not very clearly articulated in the Idaho cases growing out of this estate (*supra*), if I rightly construe them they are not out of harmony with the views herein expressed. The allegations of fraud there were substantially the same as they are here, and in the last case (*Connolly vs. Probate Court*, 25 Idaho 35) it is said:

“Since the decrees of probate courts are conclusive in such matters, unless reversed on appeal, the State of Idaho, on the relation of its Attorney General, cannot have such decrees set aside in the interest of a foreign and non-resident heir. As fully supporting this rule, see *William Hill Co. vs. Lawler*, 166 Cal. 359, 68 Am. St. 27, 48 Pac. 323. The Supreme Court of California in that case, after stating that the proceeding for the distribution of an estate is in the nature of a proceeding *in rem*, which is in the hands of an administrator or executor for distribution, says:

“By giving the notice directed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right of interest therein is required to present his claim to the

Court for its determination. Whether he appear and present his claim or fail to appear, the action of the Court is equally conclusive upon him, 'subject only to be reversed, set aside or modified on appeal.' The decree is as binding upon him if he fails to appear and present his claim as if his claim after presentation had been disallowed by the Court." * * *

"There is no question but that the proper notices were given in the administration of said estate and that all the world was notified of the proceedings in said matter, and that Bridget Madden made no appearance in said matter whatever, and did not bring these proceedings until more than two years after the decree of distribution had been made and entered by said Probate Court." * * * "The allegations of the Attorney General in the petition of the State in regard to the fraud practiced by the Connollys are quite similar to the allegations of fraud set up in the petition which the Court had under consideration in the case of *Connolly vs. Reed, supra*, and the allegations in that petition and the amended petition in that case this Court held did not constitute fraud, and we do not think the allegations of the petitions of the Attorney General charge fraud on the part of the Connollys, since it nowhere appears that through fraud or otherwise the defendants, the Connollys, kept Bridget Madden from appearing and asserting her rights, as it is not alleged that they made any misrepresentations or deceived her as to the facts of the case."

But if a different view were to be taken it would

still be necessary to hold that the plaintiffs are barred from recovery by their own laches. As we have seen, Corbett died January 30, 1907. Letters of administration issued February 20, 1907. The decree of distribution was entered August 23, 1909. This suit was commenced March 29, 1917, or seven years and seven months after the distribution. If the suit had been brought in the State court plaintiffs' cause of action would have been subject to a local statute of limitations providing that "an action for relief on the ground of fraud or mistake" must be brought within three years from the "discovery by the aggrieved party of the facts constituting the fraud or mistake." The plaintiffs admit that they learned of the death of Corbett at least as early as May, 1910, and thereupon consulted a lawyer touching the question of their heirship. They allege that on March 14, 1912, their mother instituted an action to establish her claim of heirship, and later commenced other proceedings to the same end, and that in all of such litigation they did "all in their power to further the interest of their mother." It must, therefore, be assumed that at least as early as March 14, 1912, more than five years before the commencement of this action, they had knowledge of Connolly's representations in the Probate Court, which they now charge to have been false and fraudulent. To overcome the presumption of laches, which they admit arises from the running of the period prescribed by the Idaho Statute, the only explanation they have to offer is that they repeatedly took legal advice in respect to their rights, and up to

about the time the suit was commenced they were always informed that they were not the heirs of the deceased. But can such an excuse avail them here? In reason I think the better rule would be to regard the State Statute as absolutely binding in the premises. It is admittedly fair and reasonable, and it would tend to bring discredit upon the administration of the law, if, by reason of the mere accident of residence, as a consequence of which the plaintiffs are entitled to invoke the jurisdiction of this Court, they could recover in a case where citizens of the State, with like claims, would be debarred from recovering. The statute, it is to be observed, is not limited to actions at law, but applies equally to suits in equity. But if we take the view which is the most favorable to the plaintiffs, namely, that in equity suits in the federal courts state statutes, whatever their nature or scope, are to be respected only by way of analogy in considering the defense of laches, and that the running of the period prescribed therein merely raises a rebuttable presumption of laches, our conclusions must be the same. The bill does not exhibit a case of flagrant, concealed fraud. Insofar as there was any misrepresentation at all the facts constituting it were made a public record. There is no suggestion that the defendants by corrupt or improper methods were in any wise responsible for the unfavorable legal advice given to the plaintiffs. Apparently the plaintiffs' course would have been precisely the same had the administrator, immediately upon filing the petition for distribution, expressly informed them of the con-

tents thereof. Presumably they would thereupon have taken advice and such advice would have been the same as that later secured and they would have waited seven years instead of five before commencing the present action. In other words, it is patent that they were not injured by their ignorance of the defendants' illegal claim, and for us now to say that in a case of such doubtful rights, they could, after learning the facts remain inactive for a period of almost twice the length of time prescribed by the State statute of limitations, for no other reason than that the advice they took from time to time was unfavorable, would be to entirely set at naught the statute of limitations. It is suggested that the plaintiffs are illiterate, but the fact is immaterial, for they did that which a person of the highest intelligence would have done; they sought advice from persons learned in the law. It is further suggested that greater consideration should be given to their claims because the defendants and the other distributees paid no consideration for what they received, but the consideration which they paid is quite as great as that which the plaintiffs have paid. There is no balance of equitable considerations; at most the plaintiffs have only a superior legal right.

“Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activ-

ity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar." *Wood vs. Carpenter*, 101 U. S. 135. And as was said by Judge Wallace in *Frishmuth vs. Farmers Loan & Trust Co.*, 95 Fed. 5: "While the equity jurisdiction of the courts of the United States is subject to neither limitation nor restraint by State legislation, and is uniform throughout the different States of the union, these courts, like all courts of equity, feel themselves bound, in all cases of concurrent jurisdiction, by the statutes of limitation that govern courts of law in similar circumstances; and whether they act in analogy or in obedience to those statutes is not of practical moment."

"In the application of the doctrine of laches the settled rule is that courts of equity are not bound by, but that they usually act or refuse to act in analogy to, the statute of limitations relating to actions at law of like character. * * * The meaning of this rule is that, under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after the time fixed by the analogous statute of limitations at law; but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraor-

dinary case in accordance with the equities which condition it. * * * When a suit is brought within the time fixed by the analogous statute the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches; and when such a suit is brought after the statutory time has elapsed the burden is on the complainant to show by suitable averments in his bill that it would be inequitable to apply it to his case." *Kelly vs. Boettcher*, 85 Fed. 55, 62.

"Whenever delay in bringing the suit appears, you must, to properly state your case, anticipate this defense, and reasonably excuse the delay, such as the existence of some disability, or a fraudulent concealment of the facts by the defendant, or it must be shown that in the nature of things the cause of action or fraud perpetrated could not sooner have been discovered. There must be distinct averments when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by the exercise of ordinary diligence, the discovery could not have been sooner made." *Simpkins, A Federal Equity Suit*, p. 277. See also *Wood vs. Carpenter*, *supra*.

No case has been drawn to my attention which, by reason of a close similarity of facts, tends to support the plaintiffs' contention, and upon the whole it must be held that they have failed to disclose any such unusual facts or extraordinary circumstances as would warrant this Court in disregarding a fair and rea-

sonable State statute and in thus enabling the plaintiffs to litigate a charge of fraud the facts involved in which they knew more than five years before they took any action. Possibly rights of innocent parties have not grown up, but it may very well be that the defendant, Lawrence F. Connolly, has for some time acted upon the assumption that, after being drawn into court three times touching the probity of his conduct and the propriety of his claim to be one of the heirs of the deceased, he would be exempt from further harrassment. As has already been stated, the plaintiffs allege that they took a deep interest in the other suits, and, if they did not render assistance, it is to be inferred that at least they gave encouragement thereto, and the Court should not be astute to find a way by which they can now be heard in their own right to assert a fraud which their mother, under their encouragement and possibly with their aid, repeatedly but unsuccessfully asserted.

The motion will be sustained and the bill dismissed.
Filed July 11, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 681.

PLAINTIFFS' MOTION TO AMEND BILL OF
COMPLAINT.

Comes now the plaintiffs in the above entitled cause, and begs leave to amend their Bill of Complaint, in the following particulars, by striking out

the following words in line eight (8) and nine (9), of paragraph nineteen (19), to-wit:

“that said representations were made by said Lawrence F. Connolly.”

and to insert in the place thereof, the words:

“at the time knowing that they were not the next of kin or his heirs at law, or as such entitled to a distributive share of said estate; that said representations were made by the said Lawrence F. Connolly, while acting as administrator of said estate.”

Said amendment to be made either by re-writing the said Bill of Complain, and the filing and service thereof, or by the filing and service of the amendment herein set forth, in accordance with the order or direction of this Court.

CALEB JONES, Solicitor.

Endorsed, filed July 23, 1917.

W. D. McReynolds, Clerk.

Amend.

ORDER DENYING MOTION TO ~~DISMISS~~.

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Monday, the thirtieth day of July, 1917.

Present: Hon. Frank S. Dietrich, Judge.

CELIA DIAMOND, *et al.*,

vs.

LAWRENCE F. CONNOLLY, *et al.*

CIVIL No. 681, N. D.

It was ordered that the plaintiffs' motion to amend the complaint herein, be, and the same is hereby denied. The plaintiffs being allowed exceptions to said order.

(Title of Court and Cause.)

No. 681.

DECREE.

This cause came on to be heard at the spring term, 1917, of the Northern Division, and was argued by counsel upon motion to dismiss; and thereupon, the same having been submitted for decision, and a written opinion having been heretofore filed,

It is accordingly ordered, adjudged, and decreed that the plaintiffs' Bill of Complaint be, and the same is, hereby dismissed absolutely, and that the defendants recover their costs, taxed at \$.....

Plaintiffs are given exceptions.

Dated this thirtieth day of July, 1917.

FRANK S. DIETRICH,
District Judge.

Filed July 30, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 681.

PETITION FOR APPEAL.

To the Hon. Frank S. Dietrich, District Judge of the District Court of the United States, District of Idaho:

The above named plaintiffs feeling themselves aggrieved by the decree made and entered in this cause on the thirtieth day of July, A. D. 1917, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that their appeal be allowed and that a

Citation be issued as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioners further pray that the proper order touching the security be required of them to perfect their appeal be made.

CALEB JONES,

Solicitor for Plaintiffs.

The petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of Two Hundred (\$200.00) dollars.

Dated this nineteenth day of November, A. D. 1917.

FRANK S. DIETRICH,

District Judge.

Endorsed, filed November 19, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 681.

ASSIGNMENT OF ERRORS.

And now, on this.....day of November, A. D. 1917, came the plaintiffs herein by their solicitor, Caleb Jones, and says that the decree entered in the above cause on the thirtieth day of July, A. D. 1917, is erroneous and unjust to plaintiffs.

First, because, the Court erred in dismissing plaintiffs' complaint on the ground that it did not state

facts sufficient to constitute a valid cause of action in equity, or entitle plaintiffs to the relief prayed for against each of the several defendants.

Second, the Court erred in denying plaintiffs' motion to amend their complaint, by striking out the words in line eight (8) and nine (9), of paragraph nineteen (XIX), to-wit: "that said representations were made by Lawrence F. Connolly," and inserting in the place thereof the words: "at the time knowing that they were not the next of kin or heirs at law, or as such entitled to a distributive share of said estate; that said representations were made by the said Lawrence F. Connolly, while acting as administrator of said estate."

Third, the Court erred in dismissing plaintiffs' complaint on the ground that the cause of action therein set forth was barred by the provisions of Sections 5627 or 5666, of Subdivision 7, of Section 4831, or of Section 4834, of the Code of Civil Procedure of the Idaho Revised Codes.

Fourth, the Court erred in dismissing plaintiffs' complaint on the ground that the cause of action therein set forth was barred by the provisions of Section 4052, or Subdivision 4, of Section 4054, of the Code of Civil Procedure of the Idaho Revised Codes.

Fifth, that the Court erred in dismissing plaintiffs' complaint on the ground that, plaintiffs are barred from a recovery by reason of their apparent laches.

Sixth, that the Court erred in sustaining defendants' motions to dismiss plaintiffs' complaint.

Seventh, the Court erred in not denying defendants' motion to dismiss plaintiffs' complaint.

Eighth, the Court erred in the making and entry of that certain decree on the thirtieth day of July, A. D. 1917, absolutely dismissing plaintiffs' complaint in this action.

WHEREFORE, plaintiffs pray that said decree be reversed and that the District Court be directed to overrule defendants' said motions; and to grant plaintiffs' motion to amend their complaint; and that the defendants be required to answer and to proceed to the trial of this cause, and for such other and further relief as to the Court may seem meet and proper.

CALEB JONES,

Solicitor for Plaintiffs.

Endorsed, filed November 19, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 681.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, Celia Diamond and Bridget McGrail, as principals, and American Surety Company of New York, as surety, acknowledge ourselves to be jointly indebted to Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, and Lawrence F. Connolly, individually, John J. Connolly and John E. McBurney, appellees in the above cause, in the sum of Two Hundred (\$200.00) dollars, conditioned that,

WHEREAS, on the thirtieth day of July, A. D. 1917, in the District Court of the United States, District of Idaho, Northern Division, in a suit pending in that Court, wherein Celia Diamond and William Diamond, and Bridget McGrail and John McGrail were plaintiffs, and Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, and Lawrence F. Connolly, individually, John J. Connolly, and John E. McBurney, were defendants, numbered on equity docket as 681, a decree was rendered and entered against the said plaintiffs, and they having obtained an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, and filed a copy thereof in the office of the clerk of the Court to reverse said decree and a citation directed to the said defendants, citing and admonishing them to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, State of California.

NOW, if the said plaintiffs shall prosecute their appeal to effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

SEALED and dated this ninth day of November, 1917.

Her
CELIA X DIAMOND. (Seal.)
Mark.

Her
BRIDGET X McGRAIL. (Seal.)
Mark.

Witnesses:

W. J. Zwinggi,

Owen Rogers.

(Seal of Surety Company.)

AMERICAN SURETY COMPANY

OF NEW YORK,

By Bradley Sheppard,

Resident Vice President,

Boise, Idaho.

Attest: Chas. M. Kahn,

Resident Assistant Secretary.

The within bond on appeal approved this November 19, 1917.

FRANK S. DIETRICH,

District Judge.

Endorsed, filed November 19, 1917.

W. D. McReynolds, Clerk.

(Title of Court and Cause.)

No. 681.

PLAINTIFFS' PRAECIPE FOR TRANSCRIPT.

To W. D. McReynolds, clerk of the above entitled Court:

You will please prepare a transcript of the record in this cause, to be filed in the office of the clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, at San Francisco, California, under the appeal heretofore perfected and include in said transcript the following pleadings, proceedings and papers on file, to-wit:

1. Bill of Complaint.
2. Order directing service of Subpoena by T. L. Quarles.
3. Subpoena served on defendants with return of service.
4. Notice of Motion to Quash and Dismiss, by defendants, Lawrence F. Connolly, as administrator and individually, and John J. Connolly, served on plaintiffs May 21, 1917.
5. Motion of defendant, John E. McBurney to Dismiss for want of jurisdiction.
6. Order overruling two above mentioned motions.
7. Motion to Dismiss, by defendants, Lawrence F. Connolly, as administrator and individually, and John J. Connolly.
8. Motion of the defendant, John E. McBurney, to Dismiss.
9. Court's Decision on last two motions to dismiss.
10. Motion of plaintiffs' to Amend Bill of Complaint.
11. Order denying Motion to Amend Bill of Complaint.
12. Final Decree.
13. Petition for Appeal and Order granting it.
14. Assignment of Errors.
15. Bond on Appeal and Approval thereof by Judge.
16. Original Citation with Acceptance of Service thereon.

17. Plaintiffs' Praeipce for Transcript, and Acceptance of Service thereon.

To this transcript you will please attach the usual certificate of full transcript; and also certificate under seal showing the costs of the record and by whom paid.

Such transcript is to be prepared as required by law and the rules of this Court, and the rules of the United States Circuit Court of Appeals, at San Francisco, California, before thirty days from the date of the signing of the Citation.

CALEB JONES,

Solicitor for Plaintiffs.

Service of the foregoing Praeipce, by receipt of copy, admitted this nineteenth day of November, 1917.

C. W. BEALE,

Solicitor for Lawrence F. Connolly, and John J. Connolly, defendants.

EZRA R. WHITLA,

Solicitor for John E. McBurney, defendant.

Endorsed, filed November 19, 1917.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

*In the District Court of the United States, District
of Idaho, Northern Division.*

CELIA DIAMOND and WILLIAM DIAMOND, and
BRIDGET McGRAIL and JOHN McGRAIL,
Plaintiffs,

vs.

LAWRENCE F. CONNOLLY, Administrator of
the Estate of JOHN CORBETT, Deceased, and
LAWRENCE F. CONNOLLY, individually,
JOHN J. CONNOLLY and JOHN E. McBUR-
NEY,

Defendants.

No. 681 In Equity.

CITATION.

UNITED STATES OF AMERICA to Lawrence F.
Connolly, administrator of the estate of John Cor-
bett, deceased, Lawrence F. Connolly, individually,
John J. Connolly and John E. McBurney, Greet-
ing:

You and each of you are hereby notified that in a
certain case in equity in the United States District
Court in and for the District of Idaho, wherein Celia
Diamond and William Diamond and Bridget Mc-
Grail and John McGrail, are plaintiffs, Lawrence F.
Connolly, administrator of the estate of John Cor-
bett, deceased, and Lawrence F. Connolly, individ-
ually, John J. Connolly and John E. McBurney, are
defendants, an appeal has been allowed the plaintiffs
therein to the United States Circuit Court of Appeals
for the Ninth Circuit. You are hereby cited and ad-
monished to be and appear in said Court at San

Francisco, California, thirty (30) days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

WITNESS, the Honorable Frank S. Dietrich, Judge of the District Court of the United States, for the District of Idaho, this nineteenth day of November, A. D. 1917.

FRANK S. DIETRICH,

(Seal.)

District Judge.

Attest:

W. D. McReynolds, Clerk.

Service of the foregoing citation, by receipt of copy, admitted this nineteenth day of November, A. D. 1917.

C. W. BEALE,

Solicitor for Lawrence F. Connolly and John J. Connolly, Defendants.

EZRA R. WHITLA,

Solicitor for John E. McBurney, Defendant.

Filed November 19, 1917.

W. D. McReynolds, Clerk.

RETURN TO RECORD.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS,

(Seal.)

Clerk.

(Title of Court and Cause.)

No. 681.

CLERK'S CERTIFICATE.

United States of America,

District of Idaho,—ss.

I, W. D. McReynolds, clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages numbered from 1 to 86, inclusive, contain true and correct copies of the Bill of Complaint, Order directing service of Subpoena by T. L. Quarles, Subpoena served on defendants with return of service, Notice of Motion to Quash and Dismiss, by defendants, Lawrence F. Connolly, as administrator and individually, and John J. Connolly, Motion of defendant, John E. McBurney to Dismiss for want of jurisdiction, Order overruling two above mentioned motions, Motion to Dismiss, by defendants, Lawrence F. Connolly, as administrator and individually, and John J. Connolly, Motion of the defendant, John E. McBurney, to Dismiss, Court's Decision on last two motions to dismiss, Motion of plaintiffs' to Amend Bill of Complaint, Order denying motion to Amend Bill of Complaint, Final Decree, Petition for Appeal and Order granting it, Assignment of Errors, Bond on Appeal and approval thereof by Judge, Original Citation, Praecipe for Transcript, return to record and clerk's certificate, in the cause aforesaid, which, together, constitute the transcript of record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit. I further

certify that the cost of the record herein amounts to the sum of \$117.85, and that the same has been paid by appellants.

Witness my hand and the seal of said Court this 14th day of December, 1917.

W. D. McREYNOLDS,

(Seal.)

Clerk.

IN THE 10

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

No. 3100

CELIA DIAMOND and WILLIAM
DIAMOND, and BRIDGET Mc-
GRAIL and JOHN McGRAIL,

Appellants,

vs.

LAWRENCE F. CONNOLLY, Admin-
istrator of the Estate of John Corbett,
Deceased, and LAWRENCE F. CON-
NOLLY, Individually, JOHN J. CON-
NOLLY and JOHN E. McBURNEY,

Appellees.

In Equity

Appeal from the Dis-
trict Court, District of
Idaho, Northern Di-
vision.

BRIEF OF APPELLANTS.

CALEB JONES,

Counsel for Appellants.

FILED
JAN 25 1938

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

No.

CELIA DIAMOND and WILLIAM
DIAMOND, and BRIDGET Mc-
GRAIL and JOHN McGRAIL,

Appellants,

vs.

LAWRENCE F. CONNOLLY, Admin-
istrator of the Estate of John Corbett,
Deceased, and LAWRENCE F. CON-
NOLLY, Individually, JOHN J. CON-
NOLLY and JOHN E. McBURNEY,

Appellees.

In Equity

Appeal from the Dis-
trict Court, District of
Idaho, Northern Di-
vision.

BRIEF OF APPELLANTS.

STATEMENT OF THE CASE.

The Bill of Complaint in this cause was filled on the 29th day of March, 1917, by Celia Diamond and William Diamond, her husband, and Bridget McGrail and John McGrail, her husband, residents and citizens of the state of Pennsylvania, as plaintiffs, against

Lawrence F. Connolly, individually and as administrator of the estate of John Corbett, deceased, and John J. Connolly and John E. McBurney, residents and citizens of the state of Idaho, defendants. The plaintiffs claim to be the heirs of said John Corbett, deceased, whose estate they alleged, was without their knowledge fraudulently distributed to the said Lawrence F. Connolly, John J. Connolly, William Connolly and Ellen Udell. The plaintiffs seek to charge said Lawrence F. Connolly, administrator of said estate, *as their trustee*, with responsibility for the entire estate; and John J. Connolly and John E. McBurney as sureties on said administrators' bond, with a liability up to the limit of the penalty of the bond; and the said Lawrence F. Connolly, individually, and John J. Connolly, as distributees, up to the amount of the estate received by each of them. It is alleged that the reason why the other two distributees are not made parties, is because they are not within the jurisdiction of the court. The facts upon which this action is predicated, are set forth in plaintiffs' complaint, a summary of which is as follows:

That Celia Diamond and William Diamond were married in the year 1889, and Bridget McGrail and John McGrail were married the same year, since which date all have been citizens and residents of the state of Pennsylvania. That in the year 1892 the said Bridget McGrail and John McGrail, her husband, became citizens of the United States, and in the year 1897, the said Celia Diamond and William Diamond,

her husband, became citizens of the United States. The two women are sisters and were born in Galway, Ireland, being the daughters of Austin Madden and Bridget Madden, his wife. The said John Corbett, their mother's half brother, died January 30, 1907, in Kootenai County, Idaho, leaving an estate therein. In the month of February, 1907, on his own petition, the defendant Lawrence F. Connolly, was appointed as administrator of the estate of said John Corbett, deceased, by the Probate Court of Kootenai County, Idaho, and qualified by giving the required bond, signed by John J. Connolly and John E. McBurney, as sureties, and thereupon entered upon the discharge of his duties. That on the 4th day of March, 1907, the said defendant Lawrence F. Connolly, as administrator of said estate, filed an inventory and appraisement in said Probate Court, showing said estate to be comprised of personal property, other than cash, all valued at \$21,356.98, which, is alleged to be grossly disproportionate to its real value. That the plaintiffs Celia Diamond and Bridget McGrail are the neices of the said John Corbett, deceased, and were at the time of his death and are now his true and lawful heirs, and as such entitled to his said estate.

"That at the time that the defendant, Lawrence F. Connolly, presented to the Probate Court of Kootenai County, State of Idaho, his petition for letters of administration on the estate of the said John Corbett, deceased, he represented to the said court, that William Connolly, John J. Connolly and himself were brothers, and that Ellen Udell was their sister, and that they all were cousins of said John Corbett, deceased, and his heirs at law,

at the time knowing that they were not the next of kin or his heirs at law. That said representations were made with intent to deceive said Probate Court, and to defraud these plaintiffs."

"That on the 2nd day of August, 1909, said Lawrence F. Connolly, as the administrator of the estate of said John Corbett, deceased, filed a petition in said Probate Court of Kootenai County, Idaho, asking for a decree of distribution of said estate, therein falsely representing to said court, that he, his brothers William Connolly and John J. Connolly and his sister Ellen Udell, were the heirs at law of said John Corbett, deceased, that said representations were made by the said Lawrence F. Connolly, with the knowledge and assent of his brothers and sister, and with intent to deceive said Probate Court, and to defraud these plaintiffs as the heirs at law of the said John Corbett, deceased, by taking unto themselves the said estate, that in law, equity and right belonged to these plaintiffs."

"That on the 23rd day of August, 1909, the said Probate Court of Kootenai County, Idaho, in compliance with the petition mentioned in the last preceding paragraph hereof, and by reason of said false and fraudulent representations in said petition made, made a decree of distribution to the said Lawrence F. Connolly, William Connolly, John J. Connolly and Ellen Udell, in equal portions, what was represented to be the entire estate of said John Corbett, deceased, consisting as stated in said decree of distribution of \$19,915.38, cash, lawful money of the United States of America."

"That thereafter on the 28th day of June, 1912, the said Lawrence F. Connolly, as the administrator of the estate of the said John Corbett, deceased, distributed and delivered said estate to himself, and John J. Connolly, on the 28th of

June, 1912, and to William Connolly and Ellen Udell, on the 3rd day of July, 1912, in the proportions in said decree of distribution mentioned, with the full knowledge on the part of each and every one of them, that none of them were the next of kin living and residing in the United States of America, or the heirs at law of said John Corbett, deceased, or rightfully entitled to a share of said estate."

"That the plaintiffs Celia Diamond and Bridget McGrail, were both born near Clifden, Galway County, Ireland, and their both parents were up to the time of their respective deaths, residents and citizens of said County of Galway, and subjects of the United Kingdoms of Great Britain and Ireland. That their mother Bridget Madden was a half sister of the said John Corbett, deceased, who was also born near Clifden, County Galway, Ireland. That the parents of the defendants Lawrence F. Connolly, William Connolly, John J. Connolly and Ellen Udell, lived near Clifden, County Galway, Ireland, and said defendants were born there. That during the early lives of the plaintiffs, defendants and the said John Corbett, deceased, their respective families were well acquainted with one another. They frequently met in a social way, traded at the same market, knew where each other lived, and recognized each other as friends and relatives."

That ever since the plaintiffs came to the United States of America they have kept in touch with their relatives and friends at Clifden, County Galway, Ireland, and have made frequent visits there, so that their whereabouts in the United States became well known to the relatives and friends of the respective parties to this action residing there.

"That, on or about the month of May, 1910, after the said defendants Lawrence F. Connolly and John J. Connolly, and their brother William Connolly and their sister Ellen Udell, had concealed or not made known the death of the said John Corbett, deceased, for a period of three years and three months, from his relatives and next of kin in Ireland, and from his other relatives and next of kin in the United States, and in about one year after they had procured a decree of distribution from the said probate court of his estate to themselves; the death of the said John Corbett, deceased, was first brought to the knowledge and attention of plaintiffs, by some neighbors, who brought to them and read an announcement in a newspaper of the death of said John Corbett, in Idaho. That plaintiffs immediately procured the assistance of a friend to write to their mother of the death of their uncle, the said John Corbett, each being illiterate and unable to write in person; believing at the time, that their mother was the sole heir of said John Corbett, and have at all times acted on such hypothesis since the death of the said John Corbett was made known to them, until they were informed by Caleb Jones, that they were the heirs of said John Corbett, deceased, in their own right, and independent of that of their mother."

That soon after the death of the said John Corbett became known to the plaintiffs, they consulted one J. W. Davidson, an attorney and counselor at law, at Pittsburg, Pennsylvania, and was by him informed that they had no direct interest in the estate of John Corbett, deceased, and could have none until their mother's death, as she was the sole heir. That the defendant Lawrence F. Connolly, while acting as the

administrator of the estate of John Corbett, deceased, made a trip to Ireland, and by fraud and misrepresentation procured an assignment to himself of the right, title and interest of the said Bridget Madden, to said estate, dated April 1st, 1911. That thereafter in March, 1912, proceedings were commenced on behalf of the said Bridget Madden, in the United States Circuit Court, of Idaho, with the object of securing the estate of the said John Corbett, deceased, which proceedings were dismissed without prejudice; and on the 28th day of May, 1911, proceedings were instituted by the said Bridget Madden in the state courts of Idaho, with the object of enforcing her claim as the sole heir of the said John Corbett, deceased, the final determination thereof being in October, 1913. That the plaintiffs took great interest in the litigation instituted on the behalf of their mother, and did all in their power to further her interest. That pending the said litigation they were frequently informed by a number of attorneys and counselors at law, that their mother was the sole heir of John Corbett, deceased, and that they would have no direct interest in his estate until her death. That neither of the plaintiffs have acquired any of the elements of a school education, and cannot read or write. That they placed reliance and confidence in the representations made to them by the several attorneys that informed them that their mother was the sole heir of John Corbett, deceased, and that they could have no interest while she lived. In discussing this matter with friends and acquaintances who were intelligent

and possessed of a school education, and in whose ability and integrity they had respect and confidence, they were repeatedly told that they could have no interest in the Corbett estate while their mother lived, as she alone was the next of kin and entitled to the estate, and plaintiffs believed such statements in connection with and confirmatory of statements made by the several attorneys consulted.

That Bridget Madden, the mother of the plaintiffs, died on the 26th day of August, 1914, and it was a very short time previous to her death that the plaintiffs learned that the courts of Idaho had denied her any right or interest in the Corbett estate, when, they took the matter up with said J. W. Davidson, who told them, that, since the courts of Idaho had determined that their mother had no right, they could have no right. Not allowing the matter to rest here, we find that they consulted other attorneys, and the question of their right in the premises was further investigated, and the record shows that it was not until August, 1916, that they were made acquainted with the disposition of the Corbett estate, and tentatively informed that they were the heirs of the said John Corbett, deceased. The record shows, that, the plaintiffs were laboring under a mistake of their rights in the premises. That they were diligent and active, and were not negligent in looking after their own interest. That they used such precaution and took such steps, as fully comports with any reasonable degree of care and activity necessary to prevent

them becoming guilty of the charge of laches, or subject to the statute of limitations. They learned of John Corbett's death in May, 1910, and were first advised that they were his heirs in August, 1916. After such advice, plaintiffs show diligence in informing defendants of their claim, and in further investigation, by consultation of distinguished attorneys, as to their rights in the premises, right up to the date of the commencement of this action. The plaintiffs have sought to set forth in detail a full and complete narration of the facts, events and circumstances, constituting the impediments to the earlier prosecution of this action in their complaint set forth. (See Transcript page 7-31.)

The several questions involved were raised in the trial court, on two several motions of the defendants, which are identical in their scope, and which were submitted, regarded and considered as one by the Court. The general sufficiency of the complaint is therein attacked, under which head, the trial court held plaintiffs' allegations of fraud, insufficient; the bar of the statutes of Idaho regarding the conclusiveness of probate decrees and expiration of the time of appeal from such proceedings; the bar of the general statute of limitations, and the doctrine of laches were interposed by the defendants, and sustained by the court.

On additional question is presented, to wit; the ruling of the trial court in denying plaintiffs' motion for permission to amend their complaint.

SPECIFICATIONS OF ERROR.

First. The Court erred in dismissing plaintiffs' complaint, on the ground that it did not state facts sufficient to constitute a valid cause of action in equity, or entitle plaintiffs to the relief prayed for against each of the several defendants.

Second. The Court erred in denying plaintiffs' motion to amend their complaint, by striking out the words in line eight (8) and nine (9) of paragraph nineteen (XIX), to wit; "that said representations were made by the said Lawrence F. Connolly," and inserting in the place thereof the words, "at the time knowing that they were not the next of kin or heirs at law, or as such entitled to a distributive share of said estate; that said representations were made by the said Lawrence F. Connolly, while acting as administrator of said estate."

Third. The Court erred in dismissing plaintiffs' complaint on the ground, that, the cause of action therein set forth was barred by the provisions of Section 5627 or 5666, or Sub. Div. 7 of Section 4831, or of Section 4834, of the Code of Civil Procedure of the Idaho Revised Codes.

Fourth. The Court erred in dismissing plaintiffs' complaint on the ground that the cause of action therein set forth was barred by the provisions of Section 4052, or of Sub. Div. 4, or Section 4054, of the Code of Civil Procedure of the Idaho Revised Codes.

Fifth. The Court erred in dismissing plaintiffs' complaint on the ground that plaintiffs are barred from recovery by reason of their apparent laches.

Sixth. That the Court erred in sustaining defendants' motions to dismiss plaintiffs' complaint.

Seventh. That the Court erred in not denying defendants' motion to dismiss plaintiffs' complaint.

Eighth. The Court erred in the making and entry of that certain decree, absolutely dismissing plaintiffs' complaint in this action.

In the presentation of argument on the several errors complained of, counsel will endeavor to follow, as near as may be, the same order of discussion as adopted by the learned Judge of the trial court in his opinion (Transcript page 57-73) indicating the grounds of his decision. The question of plaintiffs' right of succession to the estate of the said John Corbett, deceased, was assumed but not decided by the trial Judge, so that in order to make the entire case more clear, counsel for appellants beg leave to mention the basis of their claim in this respect.

Early in the year 1907 John Corbett died in Idaho, intestate, leaving surviving him, his next of kin Bridget Madden, a half sister, who was at the time, a resident and subject of the United Kingdoms of Great Britain and Ireland. Under the rule of the common law, as stated by Chancellors Blackstone and

Kent, and as announced by the Supreme Court of the United States in the case of *Orr vs. Hodgson*, 4 Wheaton 453, aliens are not deemed to be heirs of deceased persons. This old rule of the common law has been narrowed to some extent in the state of Idaho as is disclosed by its Statutes of Succession, Sections 5700-5717, Idaho Revised Codes, though not entirely abrogated. Section 5715, provides as follows:

“Resident aliens may take in all cases, by succession as citizens; and no person capable of succeeding under the provisions of this chapter is precluded from succession by reason of the alienage of any relative; but no non-resident foreigner can take, by succession, unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession.”

Now under the provisions of this law, the Supreme Court of Idaho, held that Bridget Madden never had any interest in the estate of John Corbett, deceased, because of her failure to initiate a claim within five years after the death of the said John Corbett, her brother. See *Connolly vs. Reed*, 125 Pac. 217. That court in discussing the question said:

“Our statute is not a recognition or extension of any previously existing right a non-resident alien had, but it is rather the fresh grant of a right, * * * which the state confers on aliens.”

The use of the word STATE, makes very clear, that no right is traceable by reason of personal relationship of the decedent and alien, for the STATE

provides the method of the inception of the virgin right, in derogation of the common law. In the case of *Connolly vs. Probate Court*, 136 Pac. 205, the same court declared:

“A non-resident alien cannot by failure to make application to succeed to an estate as provided by law, deprive resident heirs of a right to succeed thereto.”

The state of Virginia had a very similar statute to that of Idaho, and the court in the case of *Jackson vs. Sanders*, 2 Leigh 109, in construing the statute, stated:

“In Virginia, by statute, the course of decent is not interrupted by that of alienage of any of the lineal or collateral ancestor; and, therefore, if a citizen dies, leaving a brother who is a citizen, and a sister who is an alien, and the children of that sister who are citizens, and the brother sister, and children be all living, the children of the sister take by decent a moiety of the estate, and the brother takes the other moiety.”

The term “heirs,” means those entitled to succeed to the one dying intestate, and is not synonymous with the terms, “relative” or “kin.” Under the Idaho statute the term “heirs” is used and applies only to the next of kin, being citizens and residents of the United States. That, therefore, the plaintiffs became the heirs of said John Corbett, deceased, by reason of their being the next of kin in, and residents and citizens of the United States.

On the question of succession the appellants and the trial court seem to be in accord. It is, however,

quite apparent that there is a very wide difference between the fundamental basis of construction, contended for by appellants and that assumed by the learned Judge of the trial court, on the other vital questions involved in this case, so that in prefacing the main argument on the errors complained of, it is well to distinguish plainly the difference.

Appellants contend that immediately on the appointment of Lawrence F. Connolly as the administrator of the estate of John Corbett, deceased, he then became the trustee of the heirs of the decedent, whether known to the court or known to him, whether present or absent, represented or not represented in court. In other words, that the relationship of trustee and *cestui que trust*, immediately arose between the administrator and the heirs at law of the said John Corbett, deceased. This relationship constitutes the basis of plaintiffs' action, and must be constantly kept in mind, and applied to all the vital questions involved in this cause.

The Supreme Court of Errors, of the state of Connecticut, in the case of the Appeal of O'Neil, 55 Conn. 409, 11 Atl. 857, held, that an administrator is a trustee of the heirs of the estate, and is liable for procuring an order of distribution knowingly omitting the name of a distributee, and defines such act to be fraud.

The Supreme Court of the United States, in the case of *Michoud, e tal., vs. Girod*, 4 How. 503, 11 Law ed. 1100, said:

“We say that an executor or administrator is, in equity, a trustee for the next of kin, legatees and creditors.”

And in the case of *Johnson vs. Waters*, 111 U. S. 671, 28 Law ed. 558, said:

“We therefore conclude that after a creditor of an estate has his claim duly acknowledged by an administrator, * * * That in principle, the administrator is the trustee and holds in possession for his benefit the property of the estate which is the common pledge of the creditors.”

The trial Judge in his consideration of the case failed to consider any trust relationship, and has treated the plaintiff heirs and the defendant administrator of the estate of John Corbett, deceased, as adversaries, as parties dealing at arms length, and only individually and adversely to each other. This is evidenced not only by the reasoning of the court, but also by the fact, that in not one case cited, in support of the court's position, is the question of trustee and *cestui que trust* involved. As stated before, this trust relationship constitutes the very foundation of plaintiffs' cause, and is fundamental in its application to heirs and administrators where their interest may conflict. That in order to fairly construe plaintiffs' complaint, in order to properly consider plaintiffs' cause of action, in order to make proper application of the law and the authorities

presented in its support, it is essential to keep in mind the trust relationship of Lawrence F. Connolly to the plaintiffs in this action.

ARGUMENT.

The first assignment of error is as follows, to wit:

"The Court erred in dismissing plaintiffs' complaint, on the ground that it did not state facts sufficient to constitute a valid cause of action in equity, or entitle plaintiffs to the relief prayed for against each of the several defendants."

Under this assignment of error, questioning the sufficiency of plaintiffs' complaint, the trial court, in his discussion of the question, layed down the following premise:

"Assuming, without deciding, that plaintiffs were more closely related to the deceased than the distributees, and that, after their mother, they were next kin, and that by reason of their mother's alienage disqualifying her from inheriting they became the heirs at law of the deceased, not through their mother, but in their own right, are the facts exhibited by the bill otherwise sufficient to entitle them to relief."

and after observing the number of times that the defendant Lawrence F. Connolly had been drawn into court on charge of fraud, and the general legal proposition, that a decree of distribution is in the nature of a proceeding *in rem*, and when taken in compliance with the statute becomes final, and fore-

closes the rights of all parties, unless nullified by fraud, then proceeds to state:

"But they say that the decree was procured by fraud. What are the facts disclosed by the pleadings in this respect, and can the decree be assailed on the account thereof? The averments are, that, with the knowledge and assent of his brothers and sister, the defendant Lawrence F. Connolly, with the intent to deceive the court and defraud the plaintiffs, falsely represented in his petition for distribution that he and his co-distributers were the heirs of the deceased, and the court acted upon such representations. There is a further statement to the effect that the distributees did not advise Corbett's relatives of his death, until about a year after the distribution was made."

The trial Court is evidently in error in this last statement of fact, for none such appears in the bill of complaint. It is alleged, however, in paragraph XXVII (Transcript page 16) as follows, to wit:

"That on or about the month of May, 1910, after the said defendants Lawrence F. Connolly and John J. Connolly, and their brother William Connolly and sister Ellen Udell, had concealed, or not made known the death of the said John Corbett, deceased, for a period of three years and three months, from his relatives and next of kin in Ireland, and from his other relatives and next of kin in the United States, and in about one year after they had procured a decree of distribution from the probate court of said estate to themselves; the death of said John Corbett, deceased, was first brought to the knowledge and attention of the plaintiffs by some neighbors, who brought to them and read an announcement in a newspaper of the death of John Corbett in Idaho."

The Court will observe that this allegation is subject to a very different construction, on the question of fraud, from the statement made by the trial court. But, even with this correction, the allegation of the complaint, appellants contend, is fairly subject to a much broader statement of fact, concerning the question of fraud. To the averments cited by the trial court should be added the averment found in paragraph XVIII of the bill of complaint, (Transcript page 12) as to the knowledge of the defendants that they were not the heirs of John Corbett, deceased, and the averments found in paragraph XXI of the bill of complaint (Transcript page 13) to the effect, that, Lawrence F. Connolly the administrator distributed and delivered the estate to himself and brothers and sister, "with full knowledge on the part of each and every of them, that none of them were the next of kin living and residing in the United States of America, or the heirs at law of said John Corbett, deceased," together with the all important averments of fact showing the trustee relationship existing between the said Lawrence F. Connolly as administrator and the plaintiffs as heirs of the estate of said John Corbett, deceased. The narrowness of the trial court's basis could not but result in a wrong conclusion.

Further quoting from the decision of the trial court:

"There is no averment that Connolly either represented in the petition or testified before the court that the deceased left no relatives other than the distributees, or that he made any false statement or concealed the fact of the existence of

the plaintiffs or their relationship to the deceased. The falsity, if any there was, consisted of the claim of representation that the Connollys were the only heirs * * * not even that they were the next of kin of the deceased. A claim or representation of heirship, manifestly involves mixed questions of law and fact."

It is a little difficult for appellants to understand why, when they allege, that, the defendant Lawrence F. Connolly, the petitioner, represented that he and his brothers and sister were the cousins and heirs at law of John Corbett, deceased, that it was not tantamount to an allegation, under the laws of Idaho, that they were the next of kin of the deceased. Section 5626 of the Revised Codes of Idaho provide in part:

"Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee or devisee the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto," etc.

Sec. 5701, Id. "The property both real and personal, of one who dies without disposing of it by will, passes to the heirs of the intestate, subject to the control of the probate court, and to the possession of the administrator appointed by that court for the purpose of administration."

Sec. 5702, Id. "When any person having title to an estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in these Codes, subject to the payment of his debts, in the following manner:

1.

2.

3.

4.

5. If the decedent leave neither issue, husband, wife, father, mother, brother nor sister, the estate must go to the next of kin in equal degree," etc.

So that, under the allegations of the complaint the heirs must be the next of kin, and when a cousin alleges that he is an heir at law, it must be understood that he alleges that he is the next of kin resident in the United States, or he could not be an heir at law. The falsity of the representations of Lawrence F. Connolly, that he and his brothers and sister were the only heirs of John Corbett, deceased, with full knowledge on his part that they were not, and while he was acting as administrator, i. e., trustee, of the plaintiff heirs at law, if admitted would seem to make out plaintiffs' case, especially when taken in connection with the following statement of the trial Court:

"It is true that plaintiffs further aver that this representation was made by Connolly with the intent to deceive the court and to defraud the plaintiffs, but in the absence of averments of specific facts from which an inference of wicked intent may be drawn, this language must be held to mean nothing more than that the claim was made with the intent on the part of Connolly to induce the court to distribute the estate to him and his sister and brothers."

This meaning of the plaintiffs' allegations of the intent of Lawrence F. Connolly, when applied to him as trustee, or as administrator of said estate, is just what plaintiffs allege and contend for, and when this is conceded, it exhibits all the wickedness that could attach to the acts of any cheat or thief, for taking that, which he knew, in God's chancery belonged to someone else. In the case of *Claflin vs. Ins. Co.*, 110 U. S. 95, 28 Law ed. 82, Justice Matthews in speaking for the Court said:

" 'Fraud,' said Justice Carton, in *Lord vs. Goddard*, 13 How. 198, 'means intention to deceive.' 'Where one' said Shipley, Ch. J., in *Hammat vs. Emerson*, 27 Me. 308-326 'has made a false representation, knowing it to be false, the law infers that he did so with an intention to deceive.' If a person tells a falsehood, the natural and obvious consequence of which, if acted on, is injury to another, that is fraud."

Further quoting from the trial Court's decision:

"There is no charge that he misrepresented any material fact to the court, or wilfully withheld any information, or resorted to any trick or devise, or did anything or left anything undone which it was his duty to do, for the purpose of preventing the plaintiffs from having their day in court or fully and fairly presenting their claims for adjudication."

These two last quotations from the trial Court's decision, illustrate his absolute disregard of the salient point or basis of plaintiffs contention; that his, the relationship of trustee and *cestui que trust*, at the time existing between the plaintiffs and the said Lawrence F. Connolly, defendant. It must be conceded that the

allegations of fact sufficient to show fraud between a trustee and his *cestui que trust*, are entirely different in their scope, from those required to show fraud between adversary parties dealing at arms length. Think of the trial Court saying, "that it is not shown that Lawrence F. Connolly, did anything or left anything undone which it was his duty to do." Apply this statement to the trustee, under the allegations of plaintiffs' bill of complaint, where the trustee or administrator represented that he and his co-conspirators, were the heirs and entitled to the estate as such, at the same time knowing that they were not, and taking unto himself the property rightfully under the law belonging to the people, that the law directed he should represent, thus deceiving the court, thwarting the operation of the law, and cheating and robbing those entitled to its protection. Is this not a violation of the duty of an administrator? or was it his right as an administrator, not to represent the heirs of an estate when in conflict with his own personal interest, and leave them unrepresented, or knowingly misrepresent them in probate proceedings, and thus construe such actions as a license predatory of his official trust. Is it a violation of the duty of a trustee to knowingly give away the substance of his *cestui que trust*, or is it to be deemed in this case, one of the virtues that bears not the mark of fraud, violation of trust, or neglect or disregard of duty, and which has become sanctified by time?

The measure of duty, accountability, and right of an administrator, plaintiffs contend, are entirely different from that of an individual dealing with an estate in probate, and in the humble judgment of counsel for appellants, the trial Court failed to appreciate the application of this broad and well recognized principle. It becomes most painfully and plainly apparent, when reading the trial Court's decision, where reference is made to the Idaho cases of *Connolly vs. Reed*, 125 Pac. 213, and *Connolly vs. Probate Court*, 136 Pac. 205, wherein it is stated, "The allegations of fraud were substantially the same as they are here," thereby measuring the sufficiency of plaintiffs' allegations of fraud, by the same formula of words as was used by the Supreme Court of Idaho in the said cases, when it should have been kept in mind that the relationship of the parties in this action are entirely different. I would respectfully ask this Court to take into consideration the respective positions of the parties plaintiff and defendant, in the case at bar and the Idaho cases referred to. In the cases of *Connolly vs. Reed* and *Connolly vs. Probate Court*, *supra*, the Supreme Court of Idaho held, that Bridget Madden, had no right, title or interest, in the subject matter of the action. That she was not an heir of John Corbett, deceased. There was not therefore any trust relationship between her and the administrator Connolly. Taking into consideration this one distinguishing feature, the Court's holding that Bridget Madden's allegations concerning the fraudulent appropriation of the Corbett estate by Lawrence F. Con-

nolly, was insufficient, is reasonable and just on the premises therein assumed, but does not apply to the case at bar. There was no fraud alleged in either of the cases that could effect Bridget Madden or the party raising the question, by reason of her lack of material interest in the subject matter of litigation. I cannot comprehend that it was the intention of the Supreme Court of Idaho, to hold, that the words there used were insufficient to constitute fraud, whatever the relation of the parties to the cause.

"The common law asserts as a general principle that there shall be no definition of fraud." 2 Pars. Contr. 769.

"The courts have never laid down as a general proposition what shall constitute fraud, or any rule, beyond which they will go, lest other means of avoiding equity should be found." 1 Story Eq. Sec. 186.

"In the sense of a court of equity, fraud properly includes all acts, omissions, concealments which involve a breach of legal or equitable duty, trust, or confidence, justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another." 1 Story Eq. Sec. 187.

"Fraud consists in the suppression of the truth * * * *suppressio veri*, or in the assertion of what is false * * * *suggestio falsi*."

Examining the relationship of the parties in the case at bar, we find that even the trial Court concedes in his premise, on this question, that plaintiffs are the heirs at law of John Corbett, deceased; that Connolly,

the administrator of his said estate, falsely represented that he and his brothers and sister were the heirs of said deceased, knowing at the time that they were not; that they made such representations with intent to deceive the Probate Court and to defraud the plaintiffs, and with intent on his part to induce the Probate Court to distribute the said estate to him. It will thus be seen that the subject matter of this action is the estate of John Corbett, deceased, that the plaintiffs by reason of the heirship became parties in interest, and the relationship of trust between Lawrence F. Connolly, the administrator of said estate and plaintiff heirs becomes established; so that when plaintiffs allege, as in their proposed amended paragraph XIX, to wit:

“That on the second day of August, 1910, saaid Lawrence F. Connolly, as the administrator of the estate of John Corbett, deceased, filed a petition in the said Probate Court of Kootenai County, Idaho, asking for a decree of distribution of said estate, therein falsely representing to said court, that he, his brothers William Connolly and John J. Connolly, and his sister Ellen Udell, were the heirs at law of the said John Corbett, deceased, at the time knowing that they were not the next of kin or his heirs at law, or as such entitled to a distributive share of said estate; that said representations were made by said Lawrence F. Connolly, while acting as the administrator of said estate, with the knowledge and assent of his brothers and sister, and with intent to deceive said Probate Court, and to defraud these plaintiffs as the heirs at law of said John Corbett, deceased, by taking unto themselves the said estate, that in law, equity and right belonged to these plaintiffs.”

they allege every essential element of fraud in this one short paragraph; but, on the other hand, if the same allegations were made by Bridget Madden, regarding the misappropriation of said property, she not being an heir or party in interest, it would not be sufficient. The trial Court's speculation as to what the Probate Court Might have done, had all the facts of kinship here exhibited been presented to it, is beside the question. Every proposition presented to our courts, might be dispensed with on the same basis, and the matter be presented in the first instance to some speculator on the past and future actions of men. *Relationship of Parties*

See, Pomeroy's Eq. Jur. Sec. 958, 3rd Ed.

ASSIGNMENT OF ERROR NO. 2.

"The court erred in denying plaintiffs' motion to amend their complaint, by striking out the words in lines eight (8) and nine (9) of paragraph nineteen (19), to wit; "that said representations were made by the said Lawrence F. Connolly," and inserting in the place thereof the words, "at the time knowing that they were not the next of kin or his heirs at law, or as such entitled to a distributive share of said estate; that said representations were made by the said Lawrence F. Connolly, while acting as administrator of said estate."

Plaintiffs admit that the allegations of said paragraph nineteen (XIX) of their bill of complaint, (Transcript page 12) when considered separately from the remainder of the complaint are not as specific as a narrow construction might require, and

therefore moved the court for permission to amend. It is too plain for argument, that, if the allegations of this paragraph were too meagre or not sufficiently specific, it was error to deny the plaintiffs the privilege of amending. This privilege was denied evidently on the theory, that it would not make any difference in the final conclusion of the trial court, to which ruling the plaintiffs excepted and still except. The attitude of the trial court in this matter will become more apparent in appellants' discussion of error numbered three, which constitutes a phase of the general question of fraud and conclusiveness of probate proceedings.

ASSIGNMENT OF ERROR NO. 3.

"The Court erred in dismissing plaintiffs' complaint on the ground that the cause of action therein set forth was barred by the provisions of Sections 5627 or 5666, or Sub. Div. 7 of Section 4831, or of Section 4834 of the Code of Civil Procedure of the Idaho Revised Codes."

The sections of law above referred to, are as follows, to wit:

"Sec. 5627. WHAT THE DECREE MUST CONTAIN: In the order or decree the court must name the person and proportions or parts to which each shall be entitled, and such persons may demand and sue for, and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of heirs, legattees or devisees, subject only to be reversed, set aside, or modified on appeal."

Sec. 5666. "TIME OF APPEAL TO BE TAKEN: The appeal must be taken within sixty days after the order, decree, or judgment is entered."

Sec. 4831. "WHEN MAY BE TAKEN: An appeal may be taken to the district court of the county from a judgment or order of the probate court in probate matters:

1. Granting, refusing or revoking letters testamentary, or of administration, or of guardianship;
2. Admitting, or refusing to admit, a will to probate;
3. Against or in favor of the validity of a will, or revoking the probate thereof;
4. Against or in favor of setting apart property, or making an allowance for a widow or child;
5. Against or in favor directing the partition, sale, or conveyance of real property;
6. Settling an account of an executor, or administrator, or guardian;
7. Refusing, allowing or directing the distribution or partition of an estate, or any part thereof, or the payment of a debt, claim, legacy, or distributive share;
8. Confirming the report of appraiser setting apart the homestead.

Sec. 4834. "An appeal from the probate court in probate matters is taken by filing with the clerk of the probate court in which the judgment or order appealed from is made or entered, a notice stating the appeal from the same or some specific part thereof and serving a similar notice on the administrator, administratrix, executor or executrix (unless they be the appellants) and

upon all other parties interested who appeared upon the motion or proceeding which the appellant desires to have reviewed or upon their attorneys. The notice of appeal must be filed and served within sixty days after the order, decree or judgment is entered. The order of service is immaterial, but the appeal is ineffectual for any purpose unless within ten days after the service of the notice of appeal an undertaking be filed or a deposit of money be made with the clerk as hereinafter provided, or the undertaking be waived by the adverse party in writing."

The trial Court in his introduction of the question in relation to these statutes, says:

"But even if it were shown that the Connollys wilfully set forth in the petition for distribution material facts in respect to their relations to the deceased which they knew to be untrue, for the purpose of securing a decree in their favor, I would still be inclined to regard the bill as insufficient. It must be borne in mind that there is no suggestion of extrinsic fraud, * * * nor did he fail to discharge any duty which he owed them. The full extent of his wrong doing, if any there was, consisted in making a contention in open court that he and his brothers and sister were the heirs. Suppose he had gone further and upon the hearing had falsely testified that the deceased left no other relatives at all, * * * at most we would have a case of intrinsic fraud. And, indeed, that only intrinsic fraud is intended to be charged in the bill is, as I understand, admitted by counsel for the plaintiffs."

Counsel for plaintiffs and appellants much regret the misunderstanding of the trial Court of the position assumed by him on this phase of the question of fraud. It was never the intention of counsel to ad-

mit that only intrinsic fraud was intended to be charged. The foregoing quotation but illustrates the different premises assumed by the Court and counsel for appellants. The Court fails to recognize the trust relationship alleged and existing between Lawrence F. Connolly and the plaintiffs in this cause, and reasons from a basis of individuals dealing with each other at arms length, while counsel for appellants contend that the appointment of Lawrence F. Connolly as administrator of John Corbett, deceased, created a trust relationship between him and the heirs of that estate, thereby estopping him from dealing as an individual with the affairs of that estate. Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, could not contract with Lawrence F. Connolly, individually, or in any other manner deal with himself in a representative capacity, for he could not at the same time represent himself and his *cestui que trust*, in any court where their interest was adverse, whether in the obtaining of a decree of distribution, or in any other matter where the law assumes an adversary condition to exist. It was held by Justice Field in the Supreme Court of the United States, in the case of *Bryan vs. Kales*, 134 U. S. 126-136, 33 Law ed. 833, that,

“A judgment recovered by an individual against himself as an administrator is an absolute nullity.”

In the recent case of *Simon vs. Southern R. Co.*, 236 U. S. 126-128, 59 Law ed. 499, the Court in dis-

cussing the case of *Marshall vs. Holmes*, 141 U. S. 597, 35 Law ed. 870, and to which this court's attention is respectfully called, stated:

"The ground of decision in the Marshall case, * * * is, that while Sec. 720 prohibits the United States Courts from staying proceedings in a state court, it does not prevent them from depriving a party of the fruits of a fraudulent judgment, nor prevent federal courts from enjoining a party from using that which he calls a judgment, but which is, in fact and in law, a mere nullity."

Plaintiffs contend that the decree of distribution obtained by the said Lawrence F. Connolly, administrator of the estate of John Corbett, deceased, distributing to himself and his co-conspirators, is in fact and in law, an absolute nullity. But, assuming a less radical position, on taking into consideration the action of Lawrence F. Connolly in having the estate distributed to himself and his co-conspirators, when viewed in the light of the trust relationship existing between himself and the plaintiffs, constitutes actionable fraud, and affords the same ground for setting aside judgments and decrees, or the nullifying the effect thereof and taking from the guilty party the fruits of his own wrong, as is found in almost all the adjudicated cases on the subject from time immemorial, whether it be called extrinsic fraud, or otherwise denominated. In the case of the *United States vs. Throckmorton*, 98 U. S. 61-71, 25 Law ed. 93, the Court said:

"The frauds for which a bill in chancery will be sustained, to set aside a judgment or decree,

between the same parties, rendered by a court of competent jurisdiction, are frauds extrinsic or collateral to the matter tried by the first court and not a fraud which was in issue in the first suit."

Was the trust relationship existing between Lawrence F. Connolly and these plaintiffs in issue in the probate proceedings in which he secured a decree of distribution to himself of the property of his *cestui que trust*? It seems to me that there can be but one answer, and that in the negative. The trustee and himself individually could not be adversary parties. In the case of *Sohler vs. Sohler*, (Cal.) 67 Pac. 282, 285, it was held, that, the failure of the executrix of a will and the natural guardian of her children, even without personal adverse interest, to not represent them in an adversary capacity, against a known fraudulent claimant, in proceedings for the distribution of an estate, "was fraud extrinsic of the case." If the construction placed by the trial Court upon the cited statutes of Idaho, under the facts of this case, is to be maintained, then, it becomes possible for an administrator of an estate to secure a decree to himself of the estate of a deceased person, regardless of the laws of succession, at the time knowing that he is not an heir, and knowing who the rightful heirs are; and if he is able to keep the matter concealed for the short space of sixty days from its entry, his decree becomes conclusive against all the world, whether minors, people of unsound mind, or others laboring under any disqualification whatsoever. In the case

at bar, the decree of distribution was made and entered and became conclusive, under the trial Court's construction, more than one year before the plaintiffs had any knowledge of even the death of the decedent, and while being, under the law, represented by a trustee who knowingly misappropriated it. Sec. 5626, Revised Codes of Idaho, provides:

"Upon the final settlement of the accounts of the executor or administrator, or at any subsequent time, upon the application of the executor or administrator, or of any heir, legatee or devisee, the court must proceed to distribute the residue of the estate in the hands of the executor or administrator, if any, among the persons who by law are entitled thereto."

Sec. 5627 Id. provides:

"In the order of the decree the court must name the persons and the proportions or parts of which each shall be entitled," etc., and makes such decree conclusive.

These statutes show the duty of the Probate Court, and the parties who are entitled to petition for a decree of distribution. Under their provisions Lawrence F. Connolly, would not, in his individual capacity have been qualified to have petitioned the Probate Court for a decree of distribution of the residue of said estate, nor would the court have had jurisdiction to have entertained such a petition. He was forced to do it in his representative capacity and as an officer of the court, and to hold that an officer can legally, knowingly and purposely misinform the

court, thus causing a misperformance, or a non-performance of the plain statutory duty of the court, would be contrary to all law and precedent, for such action on the part of the administrator could only result in nullifying the entire proceedings. The plain duty of the court, in this cause, was never performed at all, owing to the fraud of its own officer. It was a fraud on the parties who by law were entitled to the estate, it was a fraud on the court, it was the fraud of their representative for his own individual benefit. It is a judgment recovered by an individual against himself as administrator, and is therefore an absolute nullity.

The cases cited by the trial Court on the question are not in point. The case of *Stead vs. Curtis*, 191 Fed. 529, was an attempt at a re-litigation of the same issues between adversary parties, personally represented in a former action, where there was no question of trust relationship involved, and is therefore no applicable to the main points involved in the case at bar. The same remark holds good as to the case of *United States vs. Throckmorton*, 98 U. S. 61; nor is the relationship of trustee and *cestui que trust* involved in the case of *Mulcahey vs. Dow*, (Cal.) 63 Pac. 158, or the case of *Linch vs. Rooney*, (Cal.) 44 Pac. 565, or *Pico vs. Cohn*, (Cal.) 25 Pac. 970, or *William Hill Co. vs. Lawler*, (Cal.) 48 Pac. 323. None of these cases are therefore in point, but the case of *Goodrich vs. Ferris*, 145 Fed. 844, and the California cases of *Sohler vs. Sohler*, 67 Uac. 282

and *Bacon vs. Bacon*, 89 Pac. 317, support the position taken by counsel for appellants, that is, that judgments and decrees may be set aside for fraud, and that a statute that makes a decree of distribution final and conclusive does not apply to cases like the one at bar, whether on the theory that courts have authority to set aside judgments and decrees for extrinsic fraud, or on their authority to deprive the wrong doer of the fruits of the judgment obtained by fraud, without directly setting aside the same. In support of appellants' position on this point, attention is respectfully called to the following authorities:

"Courts of equity have jurisdiction in cases where the next of kin is suing the administrator and his sureties, to recover the complainant's share of decedent's estate." Sec. 9 b. and Sec. II, *Foster Federal Practice*, 4th Ed.; *Payne vs. Hook*, 7 Wall. 425; *Pratt vs. Northam*, 5 Mason 95.

"A Bill to set aside a judgment of a state court will be entertained in a federal court." *Foster Federal Practice*, Sec. 358 (4th Ed.); *Gaines vs. Fuentes*, 92 U. S. 10; *Barroa vs. Hutton*, 99 U. S. 80.

"If through fraud or perjury an heir has been deprived of property, he has his remedy in a court of equity." *Connolly vs. Probate Court*, 25 Idaho 35, 136 Pac. 205.

"If the administration has been completed and the property passed out of the control of the Probate Courts, the Federal Courts can avail themselves of their jurisdiction in law or equity, in reference thereto." *Hale vs. Coffin*, 114 Fed. 575; *Herron vs. Comstock*, 71 C. C. A. 466, 139 Fed. 378; *Hayes vs. Pratt*, 147 U. S. 570; *Spencer vs. Watson*, 94 C. C. A. 659, 169 Fed. 379.

"So an heir may establish his right to a distributive share of an estate." *Byers vs. McAuley*, 149 U. S. 620; *Payne vs. Hook*, 7 Wall. 425; *O'Callahan vs. O'Brien*, 116 Fed. 934; *Rich vs. Bray*, 37 Fed. 273.

"A court of equity will take jurisdiction of a suit by a non-resident to set aside a decree of the Probate Court for fraud." *Arrowsmith vs. Gleason*, 129 U. S. 99-100; *Johnson vs. Waters*, III U. S. 668-675; *Payne vs. Hook*, 7 Wall 425.

"A court of equity has the right where other jurisdictional facts are present, without directly setting aside the proceedings in a state court, to lay its hands upon the guilty parties committing the fraud, and to hold them as trustees, for the defrauded one, to account for the proceeds of their action conceived and carried on in fraud." *Rhino vs. Emery*, C. C. A. 72 Fed. 382.

"We may concede that upon the allegations of the bill in this case the court below had no authority to set aside the decree of the Superior Court of Los Angeles County in admitting the will to probate and distributing the estate, and such is not the object of the bill. It is to declare the appellee a trustee of the property which he has inequitably obtained, and its jurisdiction to do so rests upon principles as old as equity itself." *Patterson vs. Dickson*, 193 Fed. 333.

"The most solemn transactions and judgments, may at the instance of the parties, be set aside and rendered inoperative for fraud * * * The courts of Chancery are always open to hear complaints against it, whether committed *in pais* or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or error of proceedings in another court, but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining judgment

or decree, it will deprive them of the benefit of it, and of any inequitable advantage that they have derived under it." *Johnson vs. Waters*, III U. S. 640.

"While there are general expressions in some cases apparently asserting a contrary doctrine, the later decisions of this court show that the proper Circuit Courts of the United States may, without controlling, supervising, or annulling the proceedings of state courts, give such relief in cases like the one before us, as is consistent with the principles of equity." *Arrowsmith vs. Gleason*, 129 U. S. 86-101.

"If the court finds that the parties have been guilty of fraud in obtaining a judgment * * * it will deprive them of the benefit of it." *Simon vs. Southern Railway Co.*, 236 U. S. 118-120.

Equity acts upon the person, so that the real object of this action is not necessarily, to set aside the decree of the Probate Court, but, as was said by this Court in the case of *Patterson vs. Dickinson*, *Supra*, "it is to declare the appellee a trustee of the property which he has inequitably obtained," and to simply do this, it is difficult to understand how, on recognizing the Probate proceedings as one *in rem*, that an action in personam, between some of the same parties, would necessarily call in question, the power or authority of the Probate Court to distribute the estate of said John Corbett, deceased, when the real question is the rights of the defendants to retain the fruits of their fraud. It must be manifest that such a question could arise without involving the validity of the decree of the Probate Court. To these plaintiffs, it is not fair or just for the decree in said proceedings

in rem to be effective and regarded as an action in personam. In the one jurisdiction is acquired by the possession of the thing, and the giving of general notice, while in the other personal service alone will serve to give jurisdiction to bind the individuals, unless the doctrine announced in the case of *Pennoyer vs. Neff*, 95 U. S. 714, is now relegated to the forgotten past. The grievance complained of in this action in personam, was not adjudicated in the proceeding *in rem*, in the Probate Court. The gravamen of this action "is to declare the appellees the trustees of the property that they have inequitably obtained."

ASSIGNMENT OF ERROR NO. 4.

"The Court erred in dismissing plaintiffs' complaint on the ground that the cause of action therein set forth was barred by the provisions of Section 4052 of Sub. Div. 4 of Section 4054, of the Code of Civil Procedure of the Idaho Revised Codes."

The sections of the Idaho statutes referred to in the above assignment of error, are a part of the general statutes of limitation for the commencement of actions, see Sections 4030-4080, and are as follows, to wit:

"Section 4052. Within five years: An action upon any contract, obligation, or liability founded upon an instrument in writing."

"Section 4054. Within three years:

"1. An action upon a liability created by statute, other than a penalty or forfeiture;

"2. An action for trespass upon real property;

"3. An action for taking, detaining, or injuring any goods or chattles, including actions for specific recovery of personal property;

"4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Appellants desire to discuss the questions involved in this assignment of error, under sub heads, as follows, to wit:

Disability of plaintiffs to bring an action.

Statute not to apply until the discovery of the fraud.

Statute not to apply until the discovery of the mistake.

State statutes not applicable to cases of exclusive equity jurisdiction.

State statutes not applicable to trusts.

DISABILITY OF PLAINTIFFS TO BRING AN ACTION.

Section 4070 of the Revised Codes of Idaho is as follows:

"If a person entitled to bring an action, other than for the recovery of real property, be, at the time the cause of action accrued, either:

1. Within the age of majority; or
2. Insane; or
3. Imprisoned on a criminal charge, or in

execution under the sentence of a criminal court for a term less than life; or

4. A married woman, and her husband be a necessary party with her in commencing such action:

The time of such disability is not a part of the time limited for the commencement of the action."

Plaintiffs' complaint shows that John Corbett died January 30, 1907. That letters of administration of his estate issued to Lawrence F. Connolly, February 20, 1907. That a decree of distribution of said estate was entered August 23, 1909, and the estate was actually distributed on the 28th day of June and the 3rd day of July, 1912. The plaintiffs in this action are married women and have been since 1889. In Foster Federal Practice, Sec. 28 (4th Ed.) it is stated:

"General rule as to persons capable of being plaintiffs. All persons may file a bill in equity in their own right, except alien enemies, infants, idiots, lunatics, married women, and possibly those who by the laws of the state have been civilly dead."

In this case it must be evident to this Court that the plaintiffs have been laboring under the statutory disability of married women.

"In suits by married women, the husband must join in all cases, unless their interest are antagonistic, or he refuses to join, then he must be made a defendant; and in such cases the wife must sue by the next friend. Equity Rule 87; *Duglas vs. Butler*, 6 Fed. 228; *Taylor vs. Holmes*, 14 Fed. 498; *United States vs. Pratt Coal & Coke*

Co., 18 Fed. 708. This rule must be observed, as federal courts will not follow state practice or state statutes creating a different rule in equity suits. *Wills vs. Pauly*, 51 Fed. 257; *United States vs. Pratt Coal & Coke Co.*, *supra*. But they do follow state practice on the law side. *Texas & P.R. Co. vs. Humble*, 36 C. C. A. 8, 1 U. S. App. 270, 50 Fed. 141; *Mehroff vs. Mehroff*, 25 Fed. 13." A Federal Equity Suit (Simkins) 3rd Ed. page 240.

The trial Court in discussing the question of limitation and disability of the plaintiffs to bring their action, said:

"In reason I think that the better rule would be to regard the statute as absolutely binding in the premises. It is admittedly fair and reasonable, and it would tend to bring discredit upon upon the administration of the law, if, by reason of mere accident of residence, as a consequence of which plaintiffs are entitled to invoke the jurisdiction of this court, they could recover in a case where the citizens of the state, with like claims, would be debarred from recovering."

It seems that the trial Court in this statement betrayed an inclination to enforce the statute of limitations insofar only as it could be applied against the plaintiffs, without fear of bringing "discredit upon the administration of the law"; and confined his apprehension of such "discredit" to the enforcement of that particular provision favorable to plaintiffs. It might be well to suggest that the jurisdiction of courts of the United States over individuals, is largely owing to "the mere accident of residence," and that "mere accident of residence" inhibits under our national con-

stitution the citizens of the same state from invoking their jurisdiction. To deny residents and citizens of different states the right and privileges of Court of the United States, and the advantages of their own peculiar administration of the law, is to deny them a constitutional right. *Payne vs. Hook*, 7 Wall, 425; and to so construe a state law, as did the trial Court, would be to admit at once that Equity Courts of the United States are subject to such restraint as might be imposed by state legislation. To disregard this provision of the Idaho statute, relating to the disability of married women, especially when it is in harmony with the Equity Rules of United States Courts, and refuse its application in this case, simply means its judicial repeal, and the arbitrary disregard of Equity Rules. There is infinitely more danger of bringing "discredit upon the administration of law," by courts assuming legislative functions and refusing to enforce the law as understood, because of some imaginary inequality in its application, than there is in carrying the legislature's acts into effect, when its scope is recognized as being within the constitutional limits. The trial Court's reasoning on this subject could more appropriately be applied to the disability of the criminal, perchance of another state, suffering the result of his own wrongs, because his crimes enable him to invoke a provision of the self same statute, that the good, law abiding, and tax paying citizens are not able to take advantage of, thus putting a sort of premium on crime. Yet, appellants question the authority of the trial Court to eliminate this pro-

vision of Section 4070 *supra*, regardless of any apprehension that may be entertained concerning the "discredit" that its impartial enforcement might bring "upon the administration of the law." Appellants likewise question the trial Court's authority to repeal the provision providing for the disability of married women, and insist on the fairness of its application. If a court could on the grounds of equality of right, between men and women and citizens of different states, disregard the plain Rules of Equity Practice, and also repeal the plain statutory provisions of a state, in order to enforce some ideal doctrine of equality, stability of the law and the rules of practice would be a thing of the past. On the same grounds might be repealed Section 5356, Idaho Revised Codes, which provide,

"A married woman must not be appointed administratrix. When an unmarried woman appointed administratrix marries, her authority is extinguished."

It would seem on a second thought, that the end of such judicial repeal, even in the state of Idaho where the gentle sex have such extended rights, would be almost limitless.

STATUTE NOT TO APPLY UNTIL THE DISCOVERY OF THE FRAUD.

If the section of the statute of limitation, providing for the disability of married women, is to be disregarded and not applied in this case, the appellants say, and as seriously contend, that the very section of the statute invoked by the defendants, on the question of fraud, does not apply to this case, by reason of its own provisions. Sub. Div. 4 of Section 4054 of the Revised Codes of Idaho, provide,

“An action for relief on the grounds of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party, of the facts constituting the fraud or mistake.”

The question then is, when did plaintiffs discover the fraud or mistake? or fraud and mistake? The allegations of the complaint must be taken as true in the consideration of this question, and the answer there found must be determinative of the question. It is manifestly unjust to answer this on any assumption by the Court when in direct contradiction to the plain allegations of the complaint, as did the trial Court in this cause, as is shown by the following extract from his decision:

“The plaintiffs admit that they learned of the death of John Corbett at least as early as May, 1910, and thereupon consulted a lawyer touching their heirship. They allege that on March 14, 1912, their mother instituted an action to establish her claim to heirship, and later commenced other proceedings to the same end, and in all

such litigation they did 'all in their power to further the interest of their mother.' It must therefore be assumed that at least as early as March, 1912, more than five years before the commencement of this action, they had knowledge of the Connollys representations in the Probate Court, which they now charge to be false and fraudulent." (Transcript page 68.)

The violence of this assumption, under the peculiar circumstances of this cause is certainly most extraordinary. Would the learning in May, 1910, of their uncle John Corbett's death, even put them on inquiry of any fraud perpetrated upon them, when they were laboring under the mistaken idea that their mother was the sole heir of her brother? Would the fact that they knew that their mother had commenced a suit in Idaho in March, 1912, coupled with the fact that they did "all in their power to further the interest of their mother," put them on inquiry as to a fraud perpetrated against them, when they were laboring under the mistaken idea that their mother was the sole heir of her brother John Corbett, deceased, and that they had no personal interest in the estate of their uncle while their mother lived? Consider the fact, that it is alleged that men learned in the law in whom they had respect and confidence, impressed on the minds of these poor illiterate women, the correctness of their preconceived ideas of their mothers' rights to her brother's estate, he having died intestate. And is it to be presumed by the Court that these poor illiterate women, living with their families nearly three thousand miles from the Probate Court

of Kootenai County, Idaho, under the extraordinary circumstances of this case, were familiar with the details of the administration of the estate of John Corbett, deceased or deemed to have sufficient notice to place them on inquiry, in the absence of any knowledge on their part that they were in their own right the heirs of John Corbett, deceased. If they had no interest in the estate as they mistakenly supposed, no fraud perpetrated by the administrator, however wicked his intention, whatever his knowledge, and however subject to condemnation, whether "extrinsic or collateral" or otherwise, would not be fraud upon any parties without interest. Here is a plain mistake, on the part of the plaintiffs, is it to be recognized as such under the statute of Idaho? or is this cornerstone of plaintiffs' bill of complaint, presenting the question, to be substituted by assumption as if no such question was presented, and unceremoniously disregarded in the interest of the defendants? To assume that plaintiffs knew their interest or their rights in the premises in 1910 or in 1912, despite their allegations to the contrary, is as violent as to assume a solecism in nature. Is the Court to assume that the plaintiffs were different in 1910 or 1912 to what they are now in respect to their financial interests? Is the Court justified in the assumption that these plaintiffs are different from the common bulk of mankind, and not subject to probably the most impelling force of humanity, that of selfishness? Is it even reasonable to assume that the plaintiffs knew of many thousand dollars that awaited them in Idaho, and

would have come to their use and enjoyment, on their simply filing a claim therefore? The very idea is preposterous, and is not justified in law, much less in fact. Contrast such action with their action after the discovery of the fraud and mistake. Every allegation of the complaint show their activity, shows that they were laboring under a mistake, shows their lack of knowledge of the details and facts constituting the fraud of Connolly upon them, and the practical impossibility, even with reasonable diligence to comprehend the fraud perpetrated upon them, before being informed of their rights in the premises. If, however, plaintiffs' bill of complaint is to answer the question of the time of discovery of the fraud or mistake, then let the alleged facts speak.

John Corbett died January 30, 1907, intestate, leaving an alien sister in Ireland and the plaintiffs, neices, citizens and residents of the United States. That February 9, 1907, Lawrence F. Connolly filed a petition in the Probate Court of Kootenai County, Idaho, representing himself and his brothers and sister as the cousins of said John Corbett, deceased, and his heirs at law, at the time knowing that they were not the next of kin or his heirs at law. That on the 20th of February, 1907, he was appointed administrator of the estate of the said John Corbett, deceased, and on the same day qualified by giving a bond for the faithful performance of his duties. That on March 4, 1907, he filed an inventory and appraisal of said estate, and on the 2nd day of

August, 1909, he filed a petition in said Probate Court for the final distribution of said estate, therein falsely representing that he and his brothers and sister were the heirs of said estate. That by reason of such representations the Probate Court directed the distribution of said estate to be made to said administrator and his brothers and sister. That for some reason or other the distribution was not actually made until the 28th day of June and the 3rd day of July, 1912. That said Lawrence F. Connolly, his brothers and sister concealed the fact of the death of the said John Corbett, deceased, or failed to make it known to the other relatives and next of kin. That in May, 1910, the plaintiff heirs of said John Corbett, deceased, were first made acquainted with the fact of his death by an announcement in a newspaper, brought to them by some friends and neighbors. That they being illiterate and unable to either read or write, procured the assistance of a friend to write their mother of the death of their uncle John Corbett; believing at the time that their mother was his sole heir, and have at all times since acted on such hypothesis since the death of the said John Corbett was made known to them, until they were informed in August, 1916, that they were the heirs of said John Corbett, deceased, in their own right, and independent of that of their mother. That soon after the death of said John Corbett was made known to them, they consulted J. W. Davidson, an attorney and counselor at law at Pittsburgh, Pa., and he informed them that they had no right or interest in the estate of John Corbett,

deceased, as their mother was the sole heir, and they being her heirs, they could have no interest in the Corbett estate until her death. Like information was given to them by Henry G. Connolly, Solicitor, of Clifden, Galway County, Ireland, on or about the 25th day of October, 1911; and by Arthur Schmidt, attorney and souncelor at law at Pittsburgh, Pa., on or about the 9th day of December, 1912; and about the same date by Elder & Elder, attorneys and counselors at law, at Coeur d'Alene, Idaho. That they were repeatedly told by friends and neighbors, who possessed a school education, and in whose ability and integrity they had full confidence and respect, that their mother who was the next of kin of said John Corbett, deceased, was his heir and entitled to his estate. Plaintiffs believed such statements in connection with and confirmatory of the several statements of said attorneys and counselors at law. That their mother Bridget Madden died on the 26th day of August, 1914, and soon thereafter plaintiffs consulted said J. W. Davidson, who then informed them that they had no right in or to the estate of John Corbett, deceased, for the reason that the Supreme Court of the state of Idaho had determined on two occasions that their mother Bridget Madden had no right, and since she had no right they could have no right. That about the first of the year 1916, plaintiffs called on Bradley McK. Burns, an attorney and counselor at law, at Pittsburgh, Pennsylvania, and he undertook to investigate the matter in their behalf, and told them that he feared that their cause was hopeless. That

soon thereafter a rumor came to these plaintiffs, which they were unable to verify, that the said Connollys had destroyed the last will and testament of said John Corbett,, deceased, which by its terms made Bridgett Madden his sole heir. That of this fact plaintiffs informed the said Bradley McK. Burns, and he told them that it would be necessary for him to make a trip to Idaho and the state of Nebraska in order to get exact information as to the status of the Corbett estate, and other facts in connection with the matter that might be beneficial to the said plaintiffs as the heirs of Bridgett Madden, deceased. That if he did not do it himself that he advised that some one qualified do so at once. That on or about the 10th day of August, 1916, plaintiffs left their homes in the state of Pennsylvania, and came to Spokane, Washington, and procured the services of Mr. Caleb Jones, an attorney and counselor at law, to go with them to Coeur d'Alene, Idaho, having traveled from their home, a distance of two thousand eight hundred miles, to make an investigation of the court records at Coeur d'Alene, Idaho, and other matters pertinent to and concerning the estate of the said John Corbett, deceased. That, plaintiffs with Mr. Jones made an investigation of the court records as aforesaid, on or about the 16th day of August, 1916, and these plaintiffs were then for the first time informed that the estate of the said John Corbett, deceased, was no longer under the control of the court, and that it had been distributed to the said Lawrence F. Connolly, John J. Connolly, William Connolly and Ellen Udell.

That, after the investigation of said court records at Coeur d'Alene, Idaho, and on the same day plaintiffs returned to Spokane, Washington, and employed Mr. Jones to investigate and advise them what if any interest they had in the estate of John Corbett, deceased, as the heirs of said Bridget Madden, deceased. He undertook the investigation of the matter, and in the course of a week informed them, that in his judgment, there was no chance to recover any of the assets of the Corbett estate, as representatives of their mother, for she had no right in the beginning at the time of the death of John Corbett, and had failed to initiate one within the time prescribed by the statutes of Idaho; but further advised them, that in his judgment without making further investigation of the law and the facts, and without being final, that they were then, and had been since the death of the said John Corbett, his next of kin in the United States, and his heirs, and as such entitled to inherit his estate. That this was the first time, that either of the plaintiffs, were ever informed, or had brought to their knowledge, that they were the heirs of John Corbett, deceased, or that they had any right title or interest, in and to the estate of John Corbett, deceased, by reason of their being the next of kin in the United States, and residents and citizens thereof at the date of the death of said John Corbett; and also the first time that they had brought to their knowledge the facts of the alleged fraud of the defendants Connollys and their sister Ellen Udell, on the Probate Court and against them.

The plaintiffs then formally employed the said Caleb Jones, as their attorney and counsellor at law, with full power to make settlement of the matter with the said Connollys and their sister Ellen Udell, in or outside of the courts, and with or without any legal proceeding, and with the understanding that he make such further investigation of the law and the facts, and to employ or associate such additional counsel as he thought proper; and, if after such further investigation he felt confirmed in his judgment of the rights of the plaintiffs as the heirs of the said John Corbett, deceased, he was to proceed as their attorney and counselor at law, and in their behalf commence such legal proceedings as he deemed necessary, and in such court or courts as to him seemed proper.

The said Caleb Jones in pursuance of said agreement, did on the 21st day of August, 1916, write to the defendant, Lawrence F. Connolly, a letter, stating therein the claims of the plaintiffs, and inviting a settlement or adjustment thereof without the interposition of the courts, to which no reply was made.

That thereafter on the 11th day of September, 1916, these plaintiffs, by their attorney, Caleb Jones, submitted the question of the rights as the heirs of said John Corbett, deceased, to Messrs. Graves, Kizer & Graves, a very reputable firm of layers, in the city of Spokane, state of Washington, and was by them finally advised on the 2nd day of October, 1916, that Bridgett Madden possessed a right, but since her

right had been foreclosed both by reason of failure to assert it within the statutory time, and bar of the judgment against her, it foreclosed all those in privity with her, and that the plaintiffs are in privity with her.

Thereafter, on or about the 10th day of October, 1916, the same question submitted to the said Messrs. Graves, Kizer & Graves was submitted to Messrs. Voorhees & Canfield, another reputable and distinguished firm of attorneys and counselors at law, at Spokane, Washington, who on the 7th day of March, 1917, after careful consideration, advised said Caleb Jones that they had gone very thoroughly into the various questions involved and considered plaintiffs' claims in the premises meritorious.

That on the 24th day of March, 1917, written demand was made upon the defendants Connollys for the property of the Corbett estate, to which demand no attention was paid, and on the 29th day of March, 1917, this cause was filed in the District Court of the United States, for the District of Idaho, Northern division.

These facts not only answer directly the question of the time of the discovery of the fraud and mistake, but show the reason why plaintiffs did not make an earlier discovery of the fraud and mistake alleged. They not only avoid the statute of limitation that has been invoked by the defendants, but conform to the rules of Equity pleading. For a court to as-

sume in the face of these allegations, that because plaintiffs knew one fact or two facts, that they must perforce know all other facts in connection with the administration of the affairs of said estate, and their consequential fraud upon them, without knowledge of their interest, cannot stand the test of law or rule of reason. In the absence of any statute on the question of fraud or mistake, the same rule would apply in this cause.

Justice Story said in the case of *Pratt vs. Northam*, 5 Mason 95, Fed. Case No. II, 376 page 1261:

“It is said that fraud even at law constitutes a good exception to the statute of limitations; and for a higher reason has been often admitted in equity. This, in a general sense is true as to the common statute of limitations, but, the fraud must be the fraud of the party setting up the bar of the statute.”

In the case of *Prevost vs. Gratz, et al*, 6 Wheaton 481, it is stated:

“It is certainly true, that the length of time is no bar to a trust clearly established and in a case where fraud is imputed and proved length of time ought not upon principles of eternal justice to be admitted to repel relief. On the contrary, it would seem that the length of time, during which the fraud has been successfully concealed and practiced, is rather an aggravation of the offense, and calls more loudly upon a court of equity to grant ample and decisive relief.”

In the case of *Michoud vs. Girod*, 4 Howard 561, it is stated:

"In general the length of time is no bar to a trust clearly established, and in case where fraud is imputed and proved, length of time ought not upon principles of eternal justice to be admitted to repel relief.' *Provost vs. Gratz, et al.*, 6 Wheaton 481. There is no rule in equity which excludes the consideration of circumstances, and in case of actual fraud we believe that no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom fraud is proved."

"A judgment fraudulently procured, is a fraud upon the court and upon the injured party." Sec. 919, Pomeroy's Equity Jurisprudence, 3rd Ed.

"In a fraudulent probate,, equity will declare the person deriving title under it,, a trustee for the party defrauded." Sec. 919, Id.

STATUTES NOT TO APPLY UNTIL THE DISCOVERY OF THE MISTAKE.

On the reading of plaintiffs' complaint it becomes evident, that the plaintiffs were laboring under a mistake as to their rights in the estate of John Corbett, deceased. Not a mistake that may come from negligence or passivity, but such a mistake as may be made by the vigilant and reasonably careful person. It must be conceded that the plaintiffs being the next of kin resident in the United States, became the heirs at law of John Corbett, deceased, and under the laws of Idaho were entitled to succeed to his estate. The probative facts alleged in the complaint, plainly show that plaintiffs were not only laboring under a mistake, but show conclusively the date of their first

discovery, which was in August, 1916. Any discussion or reference to this question seems to have been eschewed by the trial Court. The same statement of facts set forth in our argument on the question of the time of the discovery of fraud, is applicable to the time of plaintiffs' discovery of their mistake. A mistake has been defined, as follows:

" 'Mistake,' some intentional act, or omission, or error, arising from ignorance, surprise, imposition, or misplaced confidence." *Chicago & E. I. R. Co. vs. Hay*, 10 N. E. 29.

In applying this definition to the allegations of plaintiffs' complaint, we find every element of mistake set forth.

" 'Mistake,' as used in the statutes which confer jurisdiction in cases of 'Mistake' on courts of equity, is not limited to mistake of facts, but the word is used as generally understood in equity proceedings, and includes mistakes of law, when combined with other elements not in themselves sufficient to authorize a court of equity to interpose, but which, combined with such mistake, should entitle the party to be relieved." *Jordon vs. Stevens*, 81 Am. Dec .556 (Me.).

In the first case of *Rousmanier's Administrators*, 8 Wheat. 174, 5 Law Ed. 589-600, Chief Justice Marshall, speaking for the Court, said:

"It seems that a court of equity will relieve in case of mistake of law merely."

In the second case of *Hunt vs. Rousmanier's Administrators*, 1 Pet. I, 7 Law Ed. 27-34, Justice Washington in speaking for the Court said:

"It is not the intention of the court, in the case now under consideration, to lay it down, that there may not be cases in which a court of equity will relieve against a plain mistake arising from ignorance of the law."

"‘Mistake,’ as used in the Rev. St. Sec. 4057 (U. S. Comp. St. 190 I, p. 2756), providing that the postmaster general shall bring suit to recover a payment of money made by ‘mistake,’ includes an erroneous conclusion in the construction or application of a statute." *Wisconsin Cen. R. Co. vs. United States*, 164 U. S. 190, 41 Law Ed. 399.

The utmost that can be fairly said under the allegations of plaintiffs' complaint is, that plaintiffs made a mistake in their conception of the heirship of their mother; and it follows, "as the night the day," that they made a mistake of their own rights in and to the estate of John Corbett, deceased. Not a mistake of inertia, inactivity or negligence, but a mistake such as comes from the natural reasoning of the uninformed of the niceties of the law, and the reasoning that holds an alien sister, though next of kin, is not an heir of her resident brother dying intestate. To hold that these poor illiterate plaintiffs knew of their rights in the premises, and made no honest mistake in the matter is too grotesque to be thought of. That they asked men presumed to be learned in the law and were informed that they were not the heirs of John Corbett, deceased, but that their mother was, as they had conceived in the first instance, when they were fortuitously informed of their uncle's death, changes not the question of mistake, but only presents reasons for their perseverance therein. If some of the at-

torneys and counselors had informed them that they were the heirs of John Corbett, deceased, then, that would have given the question here presented a very different aspect, and it would have afforded some basis for the contention that the plaintiffs should have known of their rights, and consequently of the acts of fraud perpetrated upon them by Lawrence F. Connolly, the administrator of the estate of their uncle, John Corbett, deceased.

THE STATUTE DOES NOT APPLY TO SUIT IN EQUITY.

Appellants in this case seek to impress upon this Court that the case at bar is one of exclusive equity jurisdiction. Fundamentally, it rests on an equitable basis, and the remedy sought is purely equitable. It has no prototype in actions at law, and in such cases courts of equity do not recognize the rule cited by the trial Judge in the case of *Frishmuth vs. Farmers' Loan & Trust Co.*, 95 Fed. 5, that:

“All courts of equity feel themselves bound, in all cases of concurrent jurisdiction, by the statutes of limitation that govern courts of law in similar circumstances; whether they act in analogy or in obedience to those statutes is not of practical moment.”

This is not a case similar to any case at law, or one that law courts have concurrent jurisdiction, for it is purely equitable, and is alone subject to the gen-

eral rule, announced in the same case of Frishmuth vs. Farmers' Loan & Trust Co., *Supra*, to wit:

"As a general rule length of time is no bar to a trust clearly established, and express trust are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of the *cestui que trust*."

This presents another illustration of the absolute failure of the trial Court to regard the trust relationship existing between the parties to this cause, in his application of the law to the questions involved.

"In courts of law and equity having concurrent jurisdiction, the statutes of limitation applies, not otherwise." *Bank of U. S. vs. Daniel, et al.*, 9 Law Ed. 999.

"Courts of equity do not consider themselves bound by the statutes of limitation, when their jurisdiction is not concurrent with those of law.' It has been said that Federal courts of equity will never follow a state statute of limitation when there by manifest wrong and injustice would be wrought." Foster Federal Practice, 4th Ed. Sec. 8.

"It has been thoroughly settled that the jurisdiction of courts of equity cannot be limited or enlarged by state legislation nor its general powers effected by such legislation." A Federal Equity Suit, (Simkins) 3rd Ed. page 17.

"Equity jurisdiction conferred on Federal courts is subject to neither limitation nor restraint by state legislation, and is uniform throughout the different states of the Union." *Payne vs. Hook*, 7 Wall. 425.

"Equity jurisdiction of courts of the United States, is the same as that of the High Court of Chancery in England possessed. It is subject to neither limitation nor restraint by state legislation, and is uniform throughout the states of the Union. * * * In view of these authorities it is clear that the statutes of New York upon the subject of limitation does not effect the power and duty of the court below." *Kerby vs. Lake Shore, Etc., R. R. Co.*, 30 Law Ed. 572-3.

Justice Grier, in speaking for the Supreme Court of the United States, in the case of *Stearns Adm'r vs. Page*, 12 Law Ed. 928, on the question of limitation addressed to courts of equity, said:

"They also interfere in many cases to prevent the bar of the statute where it would be inequitable or unjust: as for example, if a party has perpetrated a fraud which has not been discovered until the statutable bar may apply to it in law, courts of equity will interpose and remove the bar out of the way of the injured party. In cases of mistake also, as well as fraud, they will not consider the statute as running till after the discovery of the mistake, and laches cannot be imputed to the injured party until the discovery of the fraud or mistake has been made."

The case of *Sullivan vs. Andoe*, 6 Fed. 641, is very similar in many respects to the one at bar. In 1866 Edward Sullivan died at St. Louis, Mo. To procure the distribution to Rosanna Andoe and himself, Henry Murta, represented to the Probate Court that they were the next of kin and heirs of the said Edward Sullivan, and in 1869, by reason of said representations the residue of the estate was distributed to

them. In 1879, Emily Sullivan instituted a suit in equity to establish her right as an heir, the establishment of a trust, and an accounting by those wrongfully in possession of the property; and on proving the fraud practiced on the Probate Court, the court awarded the relief prayed for over the objections based upon the statute of limitations, lapse of time, laches and delay in filing her bill.

STATUTES OF LIMITATION DO NOT APPLY TO TRUSTS.

Trusts that are not at all cognizable at law, but fall within the proper, peculiar and exclusive jurisdiction of court of equity, are not effected by the statute of limitations. 25 Cyc. 1153.

“As a general rule length of time is no bar to a trust clearly established, and express trust are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of the *cestui que trust*. *Frishmuth vs. Farmers' Loan & Trust Co.*, 95 Fed. 5.

“It is certainly true, that length of time is no bar to a trust clearly established.” *Prevost vs. Gratz, et al.*, F *Wheat.* 481, 5 Law Ed. 315; *Michoud vs. Girod, et al.*, 4 How. 561, 11 Law Ed. 1102.

An examination of the decision of the lower Court (Transcript page 69-70) will reveal the Judge speculating as to what the plaintiffs might have done, had they known all the details of the acts of the administrator in his administration of the estate of John Corbett, deceased, and then says:

"In other words, it is patent that they were not injured by their ignorance of the defendants' illegal claim, and for us to now say in a case of such doubtful rights, they could, after learning the facts, remain inactive for a period of almost twice the length of time prescribed by the statute of limitations, for no other reason than that the advice they took from time to time was unfavorable, would be to entirely set at naught the statute of limitations."

The first question suggested upon an analysis of this extract, is, what facts does the Court refer to? Surely, not the fact that they were the heirs of John Corbett, deceased, for of this primary and all important fact, which represents the key that would have unlocked the door of knowledge, the bill of complaint shows that they had absolutely no knowledge of until August, 1916. On their knowledge of this fact must rest the application of the knowledge of all other facts in the premises, actually known or presumed to be known, in connection with the "defendants' illegal claim," and the consequent fraud on plaintiffs' rights. Without it all avenues of action on their part was closed. Without it they dwelt in "ignorance of defendants' illegal claim," while with it a discovery of the fraud and its application to them, was possible to be made. If they labored under a mistake to their injury, and to defendants' advantage for so long a time, is it reason why only a particular part of the statute of limitation should be enforced, and that portion which provides, that,

"An action for relief on the ground of fraud or mistake. The cause action in such case not

to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake,"

be set at naught, without the least hesitation whatever, when its basis rests on that principle of eternal justice * * * the ultimate righting of all wrongs. There can be no question but what the all important question of heirship of the plaintiffs would have to be alleged and proven before fraud or mistake could be predicated, upon the other facts referred to by the learned Judge of the trial court, or the plaintiffs would find themselves in the same predicament as their mother in the cases of *Connolly vs. Reed* and *Connolly vs. Probate Court, Supra*, * * * a party without interest in the subject matter of the suit attempting to raise the question of fraud. But why this seeming fear of "setting the statute of limitations at naught" or rather construing it in harmony with its own provisions and in keeping with principles of right and justice and most honored precedent. It has been repeatedly done, in times past, by the highest tribunals of our land, concededly on the same high principles of morality, and no doubt, on like hallowed grounds will be repeated by the courts in the future. Such acts have received the approbation of ages, and have become thoroughly recognized as a part of our equity jurisprudence. "It has been said that a Federal court of equity will never follow a state statute of limitation when thereby manifest injustice and wrong would be wrought."

ASSIGNMENT OF ERROR NO. 5.

"That the Court erred in dismissing plaintiffs' complaint on the ground, that, plaintiffs are barred from a recovery by reason of their apparent laches."

The trial Court in his consideration of this question treated it as a question of law, and with the same absolute disregard of equitable principles and doctrines as is shown in his treatment of the other questions involved in this cause. In fact, an examination of his decision will show that the doctrine of laches as an equitable defense, in this cause, has been regarded simply as a matter of limitation in a law case. Rules of construction laid down in cases where courts of law and equity have concurrent jurisdiction are applied to the case at bar regardless of the fact that it is one of exclusive equitable cognizance. In consideration of the question of laches, on a motion to dismiss before issue joined, the facts alleged in the complaint must control, and speculation dehors the record should have no place in the consideration of the question. The following rule of equity pleading is quoted in the trial Court's decision, to which the sufficiency of plaintiffs' bill of complaint is cheerfully submitted, and the measurement of the facts therein, tested thereby.

"Whenever any delay in the bringing of your suit appears you must, to properly state your case, anticipate this defense, and reasonably excuse the delay, such as the existence of some disability, or a fraudulent concealment of the facts by the defendant, or it must be shown that in the

nature of things the cause of action of fraud perpetrated could not sooner have been discovered. There must be distinct averments when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that a court may clearly see whether, by the exercise of ordinary diligence, the discovery could have been sooner made." A Federal Equit Suit (Simkins) 3rd Ed. page 281.

Does not plaintiffs' complaint show an anticipation of the defense of laches? Does it now show that the real cause of delay in bringing this action was owing to plaintiffs' lack of knowledge of even the death of their uncle for more than a year after defendants fraudulently procured a decree of distribution to themselves of his said estate, and that owing to their mistaken conception, that their mother was the sole heir at law of her brother, said John Corbett, deceased, and therefore, they as nieces were not his heirs at law? Does the complaint not show their disability to bring this action, being married women? Does the complaint not show that it was sometime in August, 1916, that they discovered the all important fact that they were the heirs at law of said John Corbett, deceased? Does the complaint not show diligence on their part as soon as they discovered the fraud perpetrated on them? Does the complaint not show the successful concealment or suppression of the fact of John Corbett's death by the defendants, and their procurement of a decree of distribution of his estate to themselves unbeknown to his heirs at law? Does the complaint not show that Lawrence F

Connolly knew, that he and his brothers and sister, were not the heirs at law of John Corbett, deceased? Does the complaint not show that the decree of distribution of the Probate Court of Kootenai County, Idaho, was procured by reason of knowingly false and fraudulent representations of Lawrence F. Connolly, while acting as administrator of said estate? and that the fraud was not discovered as to these plaintiffs until they had knowledge that they were the heirs of said John Corbett, deceased?

“That there must have been knowledge on the part of the plaintiffs of the existence of their rights, for there can be no laches for failure to assert rights of which a party is wholly ignorant of.” Does the complaint not show that, “in the nature of things the cause of action of fraud could not sooner have been discovered”? It is a self-evident matter of impossibility to make a discovery of their cause of action, before discovering the fact that they were the heirs of John Corbett, deceased. Distinct averments are made in plaintiffs’ bill of complaint, of the time of the discovery of the frauds perpetrated upon them, see paragraph XL, Transcript page 24-25. It is true that the plaintiffs knew of the death of their uncle, John Corbett, in May, 1910, but that knowledge was not brought to them by either of the defendants. It is true that they knew of the litigation of their mother in a general way, in her efforts to secure the estate of John Corbett, her deceased brother; but, it is not true, nor can there be justly drawn any inference from

plaintiffs' bill of complaint, that the plaintiffs knew of their rights, before the date alleged, to wit, August, 1916. While the proceedings of the Probate Court of Kootenai County, Idaho, were matters of public record, it would make no difference, for the rule as announced repeatedly by the Supreme Court of the United States, is:

"If a person be ignorant of his interest in a certain transaction, no negligence is imputable to him for failing to inform himself of his rights; but if he is aware of his interest, and knows that proceedings are pending, the result of which may be prejudicial to such interest, he is bound to look into such proceedings so far as to see that no action is taken to his detriment." *Foster vs. C. & L. M. R. Co.*, 155 U. S. 449-452, 36 Law Ed. 903.

Having, I hope, thus demonstrated to this Court that plaintiffs have conformed in each particular with the requirements of the rule of pleading cited by the trial Judge, it will now be my endeavor to make further and closer application of the principles of equity to the question of laches. What is laches? It has been ably defined a great many times by the highest and most respected judicial authorities, usually according to the circumstances of each particular case, yet, always with the announcement of some elemental principles, therefore I have selected but two definitions from the many for the answer of the query.

"Laches is such negligence as results in the omission to do what one is by law required to do to save a right, and which warrants a presumption

that the claimant has abandoned it and declines to assert it. When the assertion of the right is neglected or omitted for a period of time more or less great, and under such circumstances as to cause prejudice to an adverse party, it may operate as a bar in equity. Although a proper ingredient in the law of laches, the instances seem to be rare where Courts have declared that mere lapse of time might effect a positive bar, even in cases of purely equitable jurisdiction; while, on the other hand, relief has been frequently granted, notwithstanding great delay, when substantial justice could yet be done between the parties. Therefore mere lapse of time, where the parties remain in the same relative position, the delay working no serious wrong to the adverse party, and justice being possible, will not operate as a bar in equity." *Hamilton vs. Dooly*, 15 Utah 280, 49 Pac. 769-772.

"The length of time which a party neglects the assertion of his rights, which must pass in order to show laches, varies with the peculiar circumstances of each case and is not like the matter of limitations, subject to an arbitrary rule. It is an equitable defense, controled by equitable considerations, and the lapse of time must be so great, and the relations of the defendant to the right such, that it would be inequitable to permit plaintiff to now assert them. There must of course have been knowledge on the part of the plaintiff of the existence of the rights, for there can be no laches in failing to assert rights of which a party is wholly ignorant, and whose existence he has no reason to apprehend. And yet, as said by Justice Brown, in speaking for the court in *Foster vs. C. & L. M. R. Co.*, *Supras* 'The defense of a want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; hence the tendency of courts in recent

years has been to hold the plaintiff to a rigid compliance with the law which demands, not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts." *Halstead vs. Greman*, 152 U. S. 410-413, 38 Law Ed. 495-497; see also *Alsop vs. Ricker*, 155 U. S. 449-452, 39 Law Ed. 218-223.

Appellants contend that there is absolutely no justification for the inference, that plaintiffs abandoned or declined to assert their claim. They allege that they knew not of the existence of their right until August, 1916, being the time that they were informed that they were the heirs of John Corbett, deceased, and immediately on learning of their right took prompt action, and since have been diligent in their prosecution of their cause. Unless their failure to learn of the death of John Corbett, in the first instance, or their failure within sixty days to appeal from the decree of distribution of his estate entered more than a year before they learned of his death, or their failure and inability to earlier learn of the fact of their heirship, or make an earlier discovery of their mistake in this respect, which is not bounded by statutory provisions, there is not in the complaint, even a suggestion that they declined to prosecute their claim, or in any manner abandoned it. If the doctrine of laches is to become less equitable than even the laws of limitation, and there is no redress for honest mistakes, then indeed plaintiffs have been guilty of laches, unless this Court will continue to assert the old time honored principle, that such neg-

lect "must cause prejudice to the adverse party." It was said in the case of *Hudson vs. Cahoon*, 91 S. W. 77, "Where plaintiffs' delay does not operate to injure defendant, plaintiff is not barred from relief by laches" and "so long as the relative positions of the parties are not altered to the defendant's prejudice, delay is of very little consequence."

"Where the parties remain in the same relative position, and the delay has worked no serious wrong to the adverse party, so that justice can still be done, the claimant should not be refused relief on the ground of laches." *Just vs. Idaho Canal Co.*, 16 Idaho 653, 102 Pac. 381.

"Twenty-four years' delay, held not laches, where neither defendant nor grantee were prejudiced." *Godkin vs. Cohn*, 80 Fed. 458; *Hubbard vs. Manhattan Trust Co.*, 87 Fed. 51.

"Where heirs were induced to believe that they were not entitled to any part of their father's estate until the youngest became of age (a period of sixteen years), their delay until that time to assert their claim is not such laches as will deprive them of their rights." *Thomas vs. Armstrong*, 12 Fed. 666.

There is absolutely no suggestion in plaintiffs' bill of complaint, which constitute the only facts which should be considered, that the delay in bringing this action has worked any wrong to the adverse parties. There is absolutely no suggestion in the bill of complaint that the plaintiffs' delay has changed the relative positions of the parties to the defendants' prejudice, unless the matter is viewed on the basis that the taking from the thief of the stolen goods and their

restoration to the lawful owner is prejudicial to the thief's interest. There is absolutely no inference or suggestion of any interference with the rights of innocent parties to be found in the record of this case, and the nearest approach to it is to be found in the decision of the lower court, wherein the Judge says:

"Possibly the rights of innocent parties have not grown up, but it may very well be that the defendant Lawrence F. Connolly has for some time acted on the assumption that, after being drawn into court three times touching the probity of his conduct and the propriety of his claim to be one of the heirs of the deceased, he would be exempt from further harrassment."

From the facts alleged in plaintiffs' bill of complaint, this inference of Lawrence F. Connolly's "probity," and "propriety of his claim to be one of the heirs of the deceased," is certainly very extraordinary. If it is, as alleged, that he represented, that he and his brothers and sister were the cousins of John Corbett, deceased, and they concealed his death from his sister and other relatives, and secured a decree of distribution of the property of his estate to themselves, and when the sister and true heirs accidentally became acquainted with the death of John Corbett, and Lawrence F. Connolly learned of their acquaintance with said Corbett's death, he, with the characteristic blundering of every criminal, hastened to Ireland, with the funds of the Corbett estate still in his hands, and he still acting as administrator and trustee of the lawful heirs of the estate by the use of fraud, deceit and misrepresentation, and by surrender-

ing a tithe of her brother's money to her, procured an assignment to himself, from a poor blind old lady of 85 years of age, decrepit, and unable to either read or write, and with a failing understanding of the affairs of this world, of a presumed interest that he thought she had in her brother's estate, be any indication of "probity" and the "propriety of his claim," then I confess an absolute misunderstanding of the terms. If such is probity then what is its antithesis?

Laches is an equitable defense, controled by equitable considerations, and lapse of time must be so great that the relations of the defendants to the rights such that it would be inequitable to permit plaintiffs to now assert them. What in plaintiffs' bill of complaint shows that it would be inequitable, to direct the estate of John Corbett, deceased, be paid over to his rightful heirs at law, at this time. The learned trial Judge said:

"Assuming, without deciding, that the plaintiffs were more closely related to the deceased than the distributees, and that, after their mother, they were next of kin, and that by reason of their mother's alienage disqualifying her from inheriting they became the heirs at law of the deceased, not through their mother, but in their own right."

In all fairness should there not some affirmative facts appear in plaintiffs' bill of complaint, from which proper deductions could be made, that it would be inequitable to take property wrongfully in

the possession of the defendants and deliver it to the plaintiffs, recognized as the lawful owners?

“The defence of laches is not a mere matter of time, like limitation, but it is a question of the inequity of enforcing the claim.” *Hubbard vs. Manhattan Trust Co.*, 87 Fed. 51.

Is it inequitable to compel the administrator of an estate, as the trustee of the heirs of such estate, to distribute the same in accordance with the mandate of the law, even, though he has retained for a long time, and appropriated to his own use and benefit, the property that he knew belonged to the lawful heirs?

“It has been held that the lapse of time will not bar an established equity.” *London & S. F. Bank vs. Dexter Horton*, 126 Fed. 601, “and where it would not harm innocent persons, gross fraud was held to do away with the defense of laches.” *McIntire vs. Pryor*, 173 U. S. 54; and that “Absence of complaint from the state and late discovery of the fraud, are excuses for delay.” *Hallett vs. Collins*, 10 How. 175-187, 13 Law Ed. 376-381; and “in case of fraud upon the part of an administrator, in which each of the defendants participated, a court of equity should be slow in denying relief upon the mere ground of laches in bringing suit.” *Bryan vs. Kales*, 134 U. S. 126-136, 33 Law Ed. 829. The enforcement of these equitable principles does not, to appellants’ mind, indicate any disparagable astuteness on the part of courts to point a way by which defrauded heirs may recover their distributive share of an estate, in the hands of

their trustee and administrator of the estate. Nor is it equitable to estop the daughter heirs from doing so, because of their foreign mother's failure to establish her heirship, even though with their encouragement, under the alleged circumstances of this cause.

The points and authorities mentioned in the discussion of the foregoing assignment of error, we respectfully ask to be applied to assignments of error designated six, seven and eight.

In conclusion permit appellants to say, that in their humble judgment, the errors complained of are all owing to the failure of the learned trial Judge to appreciate the trust relationship existing between the heirs of an estate and the administrator thereof.

Respectfully submitted,

CALEB JONES,
Solicitor for Appellants.

United States
Circuit Court of Appeals
For the Ninth Circuit

CELIA DIAMOND and WILLIAM DIAMOND and
BRIDGET McGRAIL and JOHN McGRAIL,

Appellants,

vs.

LAWRENCE F. CONNOLLY, administrator of the estate
of JOHN CORBETT, deceased, and LAWRENCE F.
CONNOLLY, individually, JOHN J. CONNOLLY and
JOHN E. McBURNEY,

Appellees.

BRIEF OF APPELLEES LAWRENCE F. CONNOLLY,
administrator and individually, and JOHN J.
CONNOLLY.

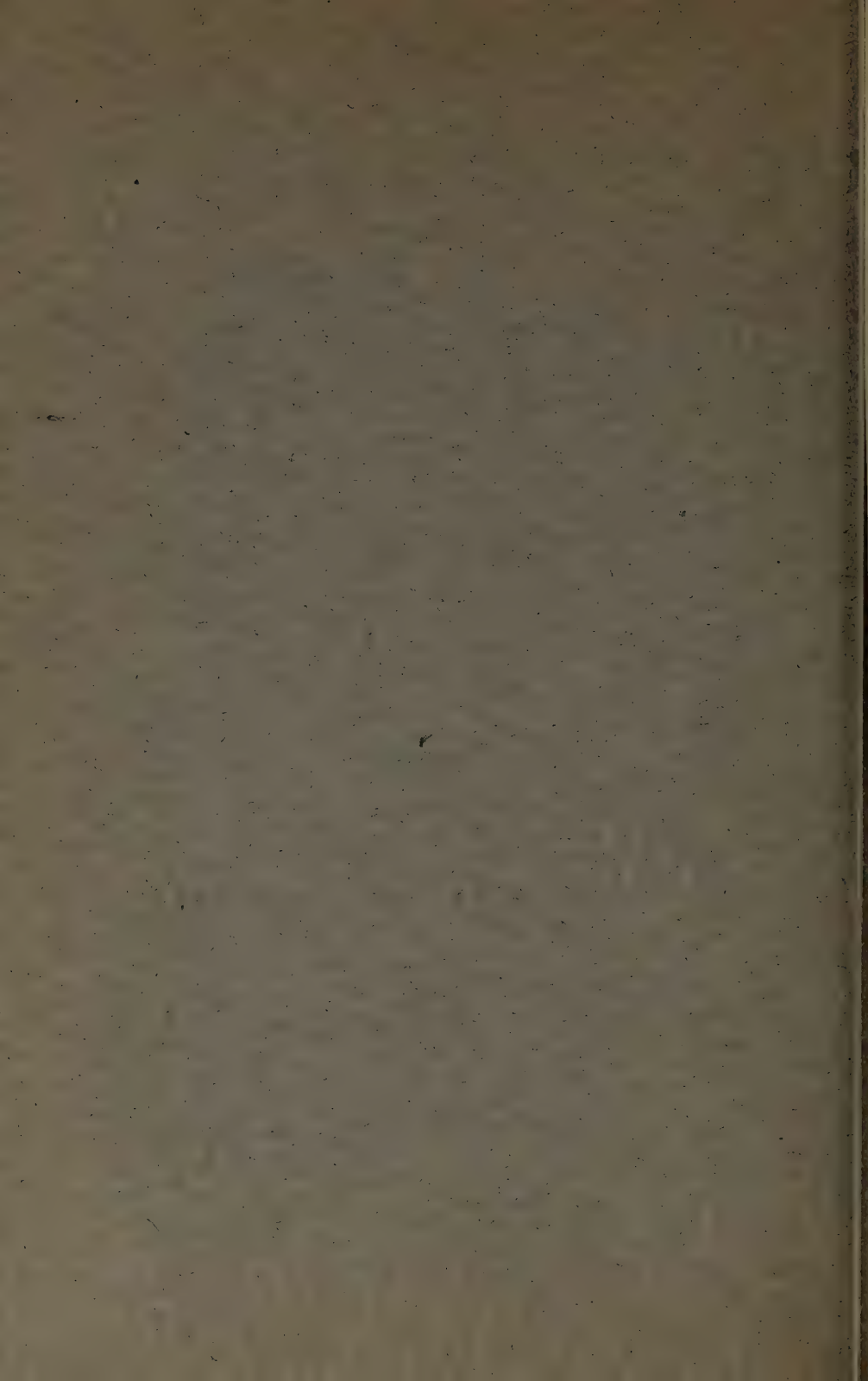
FILED

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F. D. MONCKTON,

C. W. BEALE, Solicitor for Lawrence F. Connolly,
administrator and individually, and John J. Con-
nolly, Appellees.

*Upon Appeal from the District Court of the United States,
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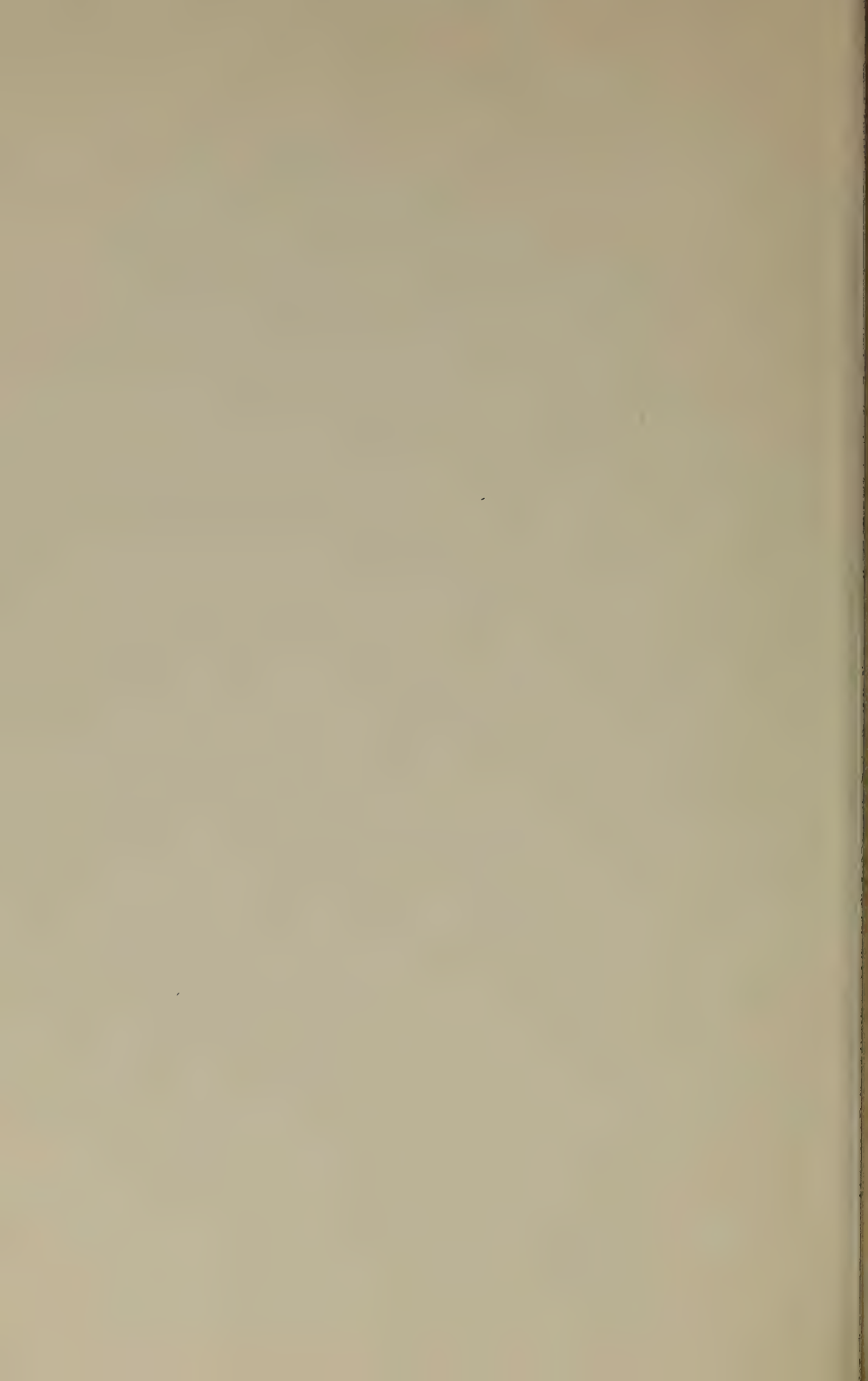
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CONNOLLY.

STATEMENT OF THE CASE.

The statement of the case as found in the decision of the learned Judge of the District Court (Record pages 57 to 73 inclusive), is so complete and fair to appellants as to make further reference to the allegations of the bill unnecessary from the standpoint of the appellees, except as it may become ad-

visible to direct the attention of the Judges of this Honorable Court to certain of such allegations in the argumentative part of their brief.

ARGUMENT.

The motion of appellees, Lawrence F. and John J. Connolly, for a dismissal of the suit and bill of complaint of appellants will be found in the Record on pages 43 to 49 inclusive.

Industrious research has not disclosed a case where the alleged facts are so devoid of equity and so antagonistic to the repeated declarations of the Supreme Court of the United States expressing such Court's disapproval of endless litigation as the allegations of the bill in the case at bar. That these appellees have been forced to appear in numerous suits instituted in different jurisdictions involving a decree of distribution made and entered on the 23rd day of August, 1909, in the estate of John Corbett, deceased, which decree, by the express provision of the Statute of Idaho, became absolute, final and conclusive within sixty days after the date thereof as to the rights of the distributees therein mentioned, and as to all heirs and claimants of such estate, and that this suit was brought to harass appellees, are facts emphatically established by the allegations of the bill.

In this connection there is submitted the following language from the decision of Judge Dietrich:

"Three times already the defendant, Lawrence F. Connolly has been drawn into court upon a similar charge of fraud, once in this Court (the case being unreported), and twice in the State courts, as appears from Connolly v. Reed, 22 Idaho, 29, and Connolly v. Probate Court, 25 Idaho, 35." Record page 59.

"Possibly rights of innocent parties have not grown up, but it may very well be that the defendant, Lawrence

F. Connolly, has for some time acted upon the assumption that, after being drawn into court three times touching the probity of his conduct and the propriety of his claim to be one of the heirs of the deceased, he would be exempt from further harassment." Record page 73.

During this prolonged litigation in four different courts, as attorney for Connolly brothers and their sister Mrs. Udell, it became necessary for the author of this brief to appear in their behalf and submit arguments on twelve different occasions, and during such arguments he has been opposed by eight different attorneys.

In the absence of actual experience it is difficult to believe in the possibility of such endless litigation. Again and again have appellees been called upon to defend themselves against the same meritless charge of fraud, from which in every instance they have been finally exonerated.

The fraud attempted to be charged in the present bill is set forth in Paragraph XIX thereof (Record page 12), and is based upon the statement that appellee Lawrence F. Connolly, as the administrator of the estate of John Corbett, deceased, filed a petition in the Probate Court of Kootenai County, Idaho, asking for a decree of distribution of said estate, wherein he falsely represented to the Court that he and his brothers and sister were heirs at law of such deceased, and that such representations were made by him with the knowledge and assent of his brothers and sister, with intent to deceive the Probate Court and to defraud these appellants, and that is all there is upon which to base this suit. That such alleged representations, knowledge and intent do not constitute fraud or a foundation for a suit in equity has been repeatedly held by the Courts.

In support thereof let the decisions of the Courts speak for themselves :

In *Connolly v. Reed*, 22 Idaho, 29, on page 40 the Supreme Court of Idaho used this language :

"It is argued, however, that Bridget Madden alleged fraud on the part of the Connollys in not reporting to the probate court that she was the only surviving heir to the estate and in not advising her of the fact that her brother, John Corbett, was dead, and that he had left an estate which she was entitled to inherit. It may be conceded that the allegations of the petition are true in this respect, and still that admission would not help the case of Bridget Madden. It is not charged that the Connollys through any fraud or otherwise kept her from appearing and asserting her right or that they made any misrepresentations or that they deceived her or misrepresented facts to her."

And later in the case of *Connolly v. Probate Court*, 25 Idaho, 35, on pages 46 and 47, the Supreme Court of Idaho had this to say with reference to similar allegations of fraud :

"There is no question but that the proper notices were given in the administration of said estate and that all the world was notified of the proceedings in said matter, and that Bridget Madden made no appearance in said matter whatever, and did not bring these proceedings until more than two years after the decree of distribution had been made and entered by said probate court.

"It is contended by counsel for defendant that under the allegations of the petition of the state of Idaho, fraud and fraudulent proceedings were charged against Connolly in procuring said order and decree of distribution to be entered by the probate court, and that when said fraudulent proceedings were called to the attention of the probate court, it was the absolute duty of that court to review the matter, and if it concluded that said judgment was fraudulently obtained, to set it aside.

"The allegations of the attorney general in the petition of the state in regard to the fraud practiced by the Connollys are quite similar to the allegations of fraud set up in the petition which the court had under consideration in the case of Connolly v. Reed, *supra*, and the allegations in that petition and the amended petition in that case this court held did not constitute fraud, and we do not think the allegations of the petitions of the attorney general charge fraud on the part of the Connollys, since it nowhere appears that through fraud or otherwise the defendants, the Connollys, kept Bridget Madden from appearing and asserting her rights, as it is not alleged that they made any misrepresentations or deceived her as to the facts of the case."

The following language of the decision herein is quoted as it covers the matter in intelligent detail:

"But the statutory proceeding for the distribution of an estate is in the nature of a suit *in rem*, and when taken in compliance with the law the decree, upon becoming final, is deemed to be binding upon all the world. Connolly v. Reed, and Connolly v. Probate Court, *supra*. There is here no charge of irregularity of procedure, and, therefore, it will be presumed that due notice was given and that generally the law was complied with. It follows that, unless nullified by fraud, the decree foreclosed the claims of all parties, including those of the plaintiffs here. So much, as I understand, the plaintiffs concede, but they say the decree was procured through fraud. What are the facts disclosed by the pleading in this respect, and can the decree be assailed on account thereof? The averments are, that, with the knowledge and assent of his brothers and sister, the defendant, Lawrence F. Connolly, with the intent to deceive the Court and to defraud the plaintiffs, falsely represented in his petition for distribution that he and his co-distributees were the heirs of the deceased, and that the Court acted upon such representations. There is further statement to the effect that the distributees did not advise Corbett's relatives of his death until about a year after the decree of distribution was made. Such is the extent of the

charge of fraud both in scope and in detail. There is no averment that Connolly either represented in the petition or testified before the Court that the deceased left no relatives other than the distributees, or that he made any false statement or concealed any fact touching the existence of the plaintiffs or their relationship to the deceased. The falsity, if any there was, consisted of the claim or representation that the Connollys were the only heirs—not even that they were next of kin of the deceased. A claim or representation of heirship manifestly involves mixed questions of law and fact. The verity of this statement is most strikingly exemplified upon the face of the bill. Bridget Madden repeatedly claimed and pleaded that she was the only heir, and yet the Supreme Court of the State denied her claim, and the plaintiffs now assert that she was not entitled to inherit. Is she, therefore, to be charged with fraud because she repeatedly came into the courts and represented that she was the heir? As the bill further discloses, the plaintiffs repeatedly took legal advice, and until recently were informed that they were not heirs. They have now come into Court asserting a right to inherit, but should the courts hold against them, would they be chargeable with an attempt to deceive? The illustrations are to the point that a party cannot be subjected to a charge of actionable fraud because in his pleading he may make a claim involving doubtful questions of mixed law and fact. It is true that the plaintiffs further aver that this representation was made by Connolly with the intent to deceive the Court and to defraud the plaintiffs, but in the absence of averments of specific facts from which an inference of a wicked intent may be properly drawn, this language must be held to mean nothing more than that the claim was made with the intent on the part of Connolly to induce the Court to distribute the estate to him and his sister and brothers. There is no charge that he misrepresented any material fact to the Court or wilfully withheld any information, or resorted to any trick or device, or did anything or left anything undone which it was his duty to do, for the purpose of preventing the plaintiffs from having their day in Court or fully and

fairly presenting their claims for adjudication. It is very plain from the diversity of advice given, and from the decisions of the Courts as set forth and explained in the bill, that if all the facts of kinship here exhibited by the bill had been before it, the Probate Court might, with much show of reason, have entered the decree now complained of. Under such conditions we ought not to consider as sufficient, and to entertain for any purpose, a charge of fraud so general and so barren of circumstantial detail." Record pages 59 to 62 inclusive.

The allegations in the bill that the appellee Lawrence F. Connolly in his petition filed in the Probate Court for the distribution of the Corbett estate falsely represented that he and his brothers and sister were the heirs of the said deceased, and that such representations were made by him with the intent to deceive the court and to defraud the appellants do not constitute fraud, or deceit, or a case for equitable interposition, and such allegations are conclusively insufficient herein when it is remembered that the Supreme Court of Idaho, in *Connolly v. Probate Court*, *supra*, referred to in appellants' bill, in passing upon this very petition for distribution held that the Connollys and their sister Mrs. Udell were cousins and heirs of Corbett and entitled to have distributed to them the Corbett estate. And the insufficiency of such allegations to entitle appellants to any relief is supported by the decision of the Supreme Court of the United States in *Van Weel v. Winston*, 115 U. S. 228, where that court in referring to a bill that had been dismissed by the decree of the Circuit Court used this significant language, found on pages 237 and 238 thereof :

"It is full of the words fraudulent and corrupt, and general charges of conspiracy and violation of trust obligations. Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not

sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust, for which a court of chancery can give relief."

The Circuit Court of Appeals of the Eighth Circuit, in *Williamson v. Beardsley*, 137 Fed. 467, in affirming the judgment of the lower court where the bill was dismissed on the grounds of limitation and laches and where fraudulent conduct on the part of an executor of an estate was alleged, on page 469 had this to say:

"To escape the bar of the statute, or rather to evade the application of the equitable doctrine of laches, the appellants averred in their bills of complaint that the executor acted fraudulently, and also that they had no notice or knowledge of the orders of the state court or of the fraudulent acts of the executor resulting in the sale and conveyance of the property until within a few months of the institution of their suits. They now contend that those averments made their bills of complaint secure from the attack of the demurrers.

"There was, however, an entire absence of averment of substantive facts justifying the charge of fraud; and in such a case the mere use, by the pleader, of the terms 'fraudulent' and 'fraudulently' signifies nothing."

If the Connollys in claiming to be heirs of John Corbett, deceased, committed any fraud, then the mother of appellants, in setting up her claim as an heir of the deceased, in which she was aided and encouraged by them, was also guilty of fraud, and thus we have aiders and abettors of their mother's fraud in a court of equity appealing to the conscience of the Chancellor.

After experimenting in the courts with the mother on two occasions and with the attorney general of the State of Idaho

on another occasion, at this late date they are attempting to experiment in the courts on their own behalf.

In their claim to be the heirs of John Corbett, deceased, the Connolly brothers and their sister, Mrs. Udell, committed no fraud and made no false claim. They *were* heirs of the deceased under the laws of the State of Idaho and as such heirs were held by the decision of the Supreme Court of Idaho to be entitled to the estate of the decedent.

The Supreme Court of the State of Idaho, in *Connolly v. Probate Court*, *supra*, on pages 51 and 52, after referring to Sections 5700, 5701 and 5702 of the Revised Codes of Idaho, devoted to the subject of succession, had this to say upon the matter of the heirship of the Connollys and their sister and their right to succeed to the estate of John Corbett, deceased:

“It is clear from the provisions of those subdivisions that the Connollys and Ellen Udell, being first cousins of Corbett and resident citizens of the United States, were heirs of said deceased and could succeed to his property provided there were no other parties who were entitled to succeed thereto by reason of closer relationship or kinship; and even if there be another heir of closer kinship and he failed to make claim thereto as provided by law, those next in order of succession may come in and inherit the property.”

Appellees are not charged with any extrinsic fraud or misconduct. Whatever they did towards securing the distribution of the estate became a matter of record in the Probate Court, open at all times to the inspection and investigation of the appellants who were legally bound to make such inspection and investigation.

Judge Dietrich in his decision has so lucidly and convincingly

ly discussed this matter as to invite a quotation of the same herein:

"It must be borne in mind that there is no suggestion of extrinsic fraud, that is, conduct upon the part of the defendants intended to deceive the plaintiffs or to prevent them from having a fair hearing upon their claims in the Probate Court. Such notice of the hearing as the law of the State requires was given, and Connolly made no false or other representation to the plaintiffs. He did nothing to prevent them from presenting their claim or having it considered, nor did he fail in the discharge of any duty which he owed them. The full extent of his wrongdoing, if any there was, consisted of making a contention in open court that he and his brothers and sister were the heirs. Suppose he had gone further and upon the hearing had falsely testified that the deceased left no other relatives at all,—at most we would have a case of intrinsic fraud. And, indeed, that only intrinsic fraud is intended to be charged in the bill is, as I understand, admitted by counsel for the plaintiffs." Record page 62.

In *Stead v. Curtis*, 191, Fed. 529; s. c. 205 Fed. 439, it was held by this Honorable Court that a court of equity would not set aside the decree of distribution on the ground of intrinsic fraud.

Mr. Justice Miller in *United States v. Throckmorton*, 98 U. S. 61, a case that has become a classic in American Jurisprudence on pages 68 and 69 used this significant and conclusive language:

"That the mischief of retrying every case in which the judgment or decree rendered on false testimony, given by perjured witnesses, or on contracts or documents whose genuineness or validity was in issue, and which are afterwards ascertained to be forged or fraudulent, would be greater, by reason of the endless nature of the strife, than any compensation arising from doing justice in individual cases."

“To overrule the demurrer to this bill would be to retry, twenty years after the decision of these tribunals, the very matter which they tried, on the ground of fraud in the document on which the decree was made. If we can do this now, some other court may be called on twenty years hence to retry the same matter on another allegation of fraudulent combination in this suit to defeat the ends of justice; and so the number of suits would be without limit and the litigation endless about the single question of the validity of this document.”

In Paragraph XXX of the bill, (Record, pages 18 and 19), it is alleged by appellants :

That on the 14th day of March, 1912, proceedings on behalf of said Bridget Madden were instituted in the United States Circuit Court of Idaho, with the object of securing to her the estate of the said John Corbett, deceased :

That on the 28th day of May, 1912, proceedings were instituted in the Probate Court of Kootenai County, Idaho, on behalf of the said Bridget Madden, with the ultimate object of establishing her right to succeed to the estate of the said John Corbett, deceased, which proceedings were determined against her by the Supreme Court of Idaho :

That after said determination by the Supreme Court of Idaho, proceedings were instituted in the District Court of Idaho, in the County of Kootenai, by the Attorney General of the State, and Elder & Elder, then looking after the interests of Bridget Madden, which proceedings were finally determined by the Supreme Court of Idaho adversely to the interests of said Bridget Madden, the mother of the appellants.

And it is further alleged in appellants' bill, in Paragraph XXXV thereof (Record page 21), in reference to such proceedings as follows :

"That pending the litigation and efforts made in behalf of their mother, Bridget Madden, to secure the estate of said John Corbett, deceased, these plaintiffs took great interest therein and did all in their power to further the interest of their mother."

Inasmuch as appellants, who, in the month of May, 1910, had knowledge of the death of John Corbett, deceased, (Record page 16), were not only familiar with these numerous proceedings brought to set aside the decree of distribution of the Corbett estate, but also took great interest and did all in their power in such proceedings, there is emphasized herein that *endless litigation and mischievous retrial of a case*, upon which the Court, in *United States v. Throckmorton*, *supra*, placed the indelible stamp of disapproval.

In applying the well established rule of the Supreme Court to this endless chain of litigation, Judge Dietrich said:

"For if we can in this action disregard the probate judgment and divest the distributees of their title, and pass the property to the plaintiffs, another court of equity may, next year, upon representations that our decree was procured by false pleadings and perjured testimony, re-examine the issues, and, if satisfied that false statements were made, take the property from the plaintiffs and return it to the distributees, and so on indefinitely, and we should have the very evil which the rule of the *Throckmorton* case is designed to prevent." Record page 64.

The Supreme Court of Idaho, first, in *Connolly v. Reed*, *supra*, and again, in *Connolly v. Probate Court*, *supra*, issued a peremptory writ of prohibition prohibiting the Probate Court of Kootenai County from taking any action or proceeding in the matter of the distribution of the estate of John Corbett, deceased, to the Connolly brothers and their sister,

Mrs. Udell, under the said decree of distribution, or from in any manner interfering with their ownership, control or possession of said property. In each of these cases there were presented similar allegations of fraud such as found herein. In both cases the Supreme Court of Idaho held that no fraud had been committed. In each of these cases the appellants took great interest and did all in their power to have the Probate Court of Kootenai County do the very things which the Supreme Court twice prohibited it from doing, and did all in their power to have the Probate Court set aside the decree of distribution and to have the property of the estate so redistributed as to pass to their mother, Bridget Madden, directly and to themselves indirectly. As her daughters they were interested in the result of and familiar with her litigation and should be bound thereby. Having failed in their former endeavors through their mother to secure a cancellation of the decree of distribution and a surrender of the property of the estate already distributed to the Connolly brothers and their sister, they again appear in court on the same meritless charge of fraud, accompanied by the further allegations in their bill as to the great interest they took in the three former suits brought either by their mother or in her interest, which they did all in their power to win, and where the records in such suits show that the acts complained of therein are the same acts complained of herein. Courts of equity do not permit this class of experimental litigation, nor do they countenance therein pretentious claims of mistake or ignorance.

It appears from the bill that appellants learned of the death of John Corbett, deceased, as early as May, 1910, and that

the first suit commenced by their mother, in which they did all in their power to further her interest, was instituted in the United States Circuit Court of Idaho on the 14th day of March, 1912. Having, according to their own averments, taken great interest in such suit and the subsequent proceedings involving the distribution of the Corbett estate, where the records in such proceedings allege the same fraudulent conduct on the part of the appellee Lawrence F. Connolly, as set forth in the bill herein, appellants cannot plead ignorance as to the facts disclosed by such records and by the decisions of the Supreme Court of Idaho in *Connolly v. Reed* and *Connolly v. Probate Court*, *supra*, referred to in their bill. Judge Dietrich characterized their conduct in such litigation in the following apt language:

“As has already been stated, the plaintiffs allege that they took a deep interest in the other suits, and, if they did not render assistance, it is to be inferred that at least they gave encouragement thereto, and the Court should not be astute to find a way by which they can now be heard in their own right to assert a fraud which their mother, under their encouragement and possibly with their aid, repeatedly but unsuccessfully asserted.” Record page 73.

It is not pretended that proper and legal notices were not given in the administration of the Corbett estate, or that the administrator deceived the appellants, made any false or any statement or representation to them, or hindered or delayed them in any manner from asserting every claim they might have had to such estate.

Furthermore, all the acts complained of were matters of record and subject to the inspection and investigation of appellants and their attorneys. Appellants not only had the

means of knowledge but the actual knowledge as to the alleged false representations in the petition of the administrator, and as to the decree of distribution and the distribution of the Corbett estate. Whether they had such knowledge or not, they had the means of knowledge, which in law is the same thing, and such is the rule as laid down in *Wood v. Carpenter*, 101 U. S. 135, a decision which has stood the test of all courts since its rendition in 1879. The following language from that case is especially applicable to the allegations and contentions in the bill herein.

On page 140 thereof it is said:

“A general allegation of ignorance at one time and of knowledge at another are of no effect.”

And on page 143:

“Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry.

“There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself.”

EVERY CLAIM OF THE APPELLANTS SET FORTH
IN THEIR BILL AND EVERY CAUSE OF ACTION
THEREIN CONTAINED ARE BARRED BY THE
STATUTES OF LIMITATIONS.

I.

DECREE OF DISTRIBUTION FINAL AND CON-
CLUSIVE.

Sec. 5627, Idaho Revised Codes is as follows: “In the order or decree the court must name the persons and the proportions or parts to which each shall be entitled, and such persons may demand, and sue for and recover their respective shares from the executor or administrator, or any person having the same

in possession. Such order or decree is conclusive as to the rights of heirs, legatees or devisees, subject only to be reversed, set aside, or modified on appeal."

Interpreting this section and referring to the failure of Bridget Madden, the mother of appellants to assert her claim as an heir to the estate of John Corbett, deceased, within the time allowed by law, the Supreme Court of Idaho, in *Connolly v. Probate Court*, *supra*, commencing on page 45, had this to say:

"Said probate court having had jurisdiction of the probating of said estate with the power to determine who were the heirs of said Corbett, deceased, and who were entitled to succeed to his estate, and what their respective interests were, and having determined these matters, and having entered its decree of distribution therein, and the decree not having been appealed from within the time provided by law for an appeal, the decree becomes conclusive as to the rights of all heirs and claimants to said estate.

"In *Miller v. Mitcham*, 21 Ida. 741, 123 Pac. 941, this court, after citing certain decisions sustaining that proposition, said:

"The foregoing authorities clearly and fully establish the proposition that the probate courts have exclusive, original jurisdiction in the settlement of estates of deceased persons, and it is within the jurisdiction of those courts to determine who are the heirs of a deceased person and who is entitled to succeed to the estate and their respective shares and interests therein. The decrees of probate courts are conclusive in such matters."

"Since the decrees of probate courts are conclusive in such matters, unless reversed on appeal, the state of Idaho, on the relation of its attorney general, cannot have such decree set aside in the interest of a foreign and non resident heir. As fully supporting this rule, see *William Hill Co. v. Lawler*, 116 Cal. 359, 68 Am. St. 27, 48 Pac. 323. The supreme court of California in that

case, after stating that the proceeding for the distribution of an estate is in the nature of a proceeding *in rem*, which is in the hands of an administrator or executor for distribution, says:

“By giving the notice directed by the statute, the entire world is called before the court, and the court acquires jurisdiction over all persons for the purpose of determining their rights to any portion of the estate; and every person who may assert any right or interest therein is required to present his claim to the court for its determination. Whether he appear and present his claim or fail to appear, the action of the court is equally conclusive upon him, ‘subject only to be reversed, set aside or modified on appeal.’ The decree is as binding upon him if he fail to appear and present his claim as if his claim after presentation had been disallowed by the court.”

“In *Goodrich v. Ferris*, 214 U. S. 71, 29 Sup. Ct. 580, 53 L. ed. 914, in which case the court approved the decision of the supreme court of California in the last cited case, the court says:

“It is elementary that probate proceeding by which jurisdiction of a probate court is asserted over the estate of a decedent for the purpose of administering the same is in the nature of a proceeding *in rem*, and is therefore one as to which all the world is charged with notice.”

“The same doctrine is affirmed in *Cunha v. Hughes*, 122 Cal. 111, 54 Pac. 535; *Williams v. Marx*, 124 Cal. 22, 56, Pac. 603; *Mulcahey v. Dow*, 131 Cal. 73, 63 Pac. 158; *State v. O'Day*, 41 Or. 495, 69 Pac. 542. In *Clark v. Rossier*, 10 Ida. 349, 78 Pac. 358, 3 Ann. Cas. 231, this court held to the same doctrine.”

In *Stead v. Curtis*, *supra*, this Honorable Court adopted with approval the following language from the decision of Mr. Justice Moody in *Tilt v. Kelsey*, 207 U. S. 43, found on pages 55 and 56:

“When the owners of property die, that property, under the conditions and restrictions of the law applicable, is transmitted to their successors named by their wills

or by the laws regulating inheritance in cases of intestacy. For a suitable time it is essential that the property should remain under the control of the state, until all just charges against it can be discovered and paid, and those entitled to it as new owners can be ascertained. It is in the public interest that the property should come under the control of the new owners, after such delays only as will afford opportunity for investigation and hearing to guard against mistake, injustice, or fraud. It is the duty of the sovereign to provide a tribunal, under whose direction the just demands against the estate may be determined and paid, the succession decreed, and the estate devolved to those who are found to be entitled to it. Sometimes this duty is performed by conferring jurisdiction upon a single court and sometimes by dividing the jurisdiction among two or three courts. The courts may be termed ecclesiastical, probate, orphans', surrogate or equity courts. The jurisdiction may be exercised exclusively in one, or divided among two or more, as the sovereign shall determine. But somewhere the power must exist to decide finally as against the world all questions which arise in the settlement of the succession. Mistakes may occur and sometimes do occur, but it is better that they should be endured than that, in a vain search for infallibility, questions shall remain open indefinitely. As was said by Mr. Justice Bradley, speaking on this subject in *Broderick's Will*, 21 Wall. 503, p. 519: 'The world must move on, and those who claim an interest in persons and things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*.'

In *Tilt v. Kelsey*, supra, the Supreme Court of the United States sanctioned and approved the right of a State to declare as the State of Idaho did in Section 5627, Idaho Revised Codes, that decrees of distribution shall be conclusive as to the rights of all heirs unless such decrees are reversed, set aside or modified on appeal, in the following language on page 56 of such decision:

"It is therefore within the power of the sovereign to give to its courts the authority, while settling the succession of estates in their possession through their officers, the executors or administrators, to determine finally as against the world all questions which arise therein. *Grignon v. Astor*, 2 How. 319, per Baldwin, J., p. 338; *Beauregard v. New Orleans*, 18 How. 497; *Foulke v. Zimmerman*, 14 Wall. 113; *Board of Public Works v. Columbia College*, 17 Wall. 521; *Broderick's Will*, 21 Wall. 503; *Simmons v. Saul*, 138 U. S. 439; *Byers v. McAuley*, 149 U. S. 608; *Goodrich v. Ferris*, 145 Fed. Rep. 844; *Loring v. Steinman*, 1 Met. (Mass.) 204; *Kellogg v. Johnson*, 38 Connecticut, 269; *State v. Blake*, 69 Connecticut, 64; *Exton v. Zule*, 14 N. J. Eq. 501; *Search v. Search*, 27, N. J. Eq. 137; *Harlow v. Harlow*, 65 Maine, 448; *Ladd v. Weiskoff*, 62 Minnesota, 29.

"In respect to the settlement of the successions to property on death the States of the Union are sovereign and may give to their judicial proceedings such conclusive effect, subject to the requirements of due process of law and to any other constitutional limitation which may be applicable."

The case of *Goodrich v. Ferris*, 214 U. S. 71, mentioned in *Connolly v. Probate Court*, *supra*, is the same case as *Goodrich v. Ferris*, 145 Fed. 844, wherein Circuit Judge Morrow held that a decree of distribution was conclusive and that a court of equity was without jurisdiction to interfere with the distribution of the estate. The facts therein alleged were more calculated to appeal to a court of equity than the facts herein and the ground for delay much more plausible, nevertheless the bill of complaint was dismissed.

II.

APPELLANTS ARE BARRED BY THEIR OWN
LACHES AND THE STATUE OF LIMITATIONS
OF IDAHO APPLYING TO ACTIONS INVOLV-
ING FRAUD.

The statute of limitations in Idaho applying to actions involving fraud limits the right of recovery to a time within three years after the discovery of the facts constituting the fraud and is found in Subdivision 4 of Section 4054 of Idaho Revised Codes as follows:

“Sec. 4054. Within three years:

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”

Statutes of limitation early received the approval of the Supreme Court of the United States. Their importance to society and protection in human affairs are well illustrated in the following quotation from *Wood v. Carpenter*, *supra*, found on page 139:

“Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar.”

After quoting from *Connolly v. Probate Court*, *supra*, wherein the Supreme Court of Idaho held that the decree of distribution was conclusive and that allegations substantially the same as those in the bill of complaint herein did not constitute fraud on the part of Lawrence F. Connolly, administrator, or his brothers and sister, Judge Deitrich most convincingly points out that independently of such holding the

appellants are barred from recovery and his reasoning, found on pages 67, 68 and 69 of the Record is unanswerable :

“But if a different view were to be taken it would still be necessary to hold that the plaintiffs are barred from recovery by their own laches. As we have seen, Corbett died January 30, 1907. Letters of administration issued February 20, 1907. The decree of distribution was entered August 23, 1909. This suit was commenced March 29, 1917, or seven years and seven months after the distribution. If the suit had been brought in the State court plaintiffs' cause of action would have been subject to a local statute of limitations providing that ‘an action for relief on the ground of fraud or mistake’ must be brought within three years from the ‘discovery by the aggrieved party of the facts constituting the fraud or mistake.’ The plaintiffs admit that they learned of the death of Corbett at least as early as May, 1910, and thereupon consulted a lawyer touching the question of their heirship. They allege that on March 14, 1912, their mother instituted an action to establish her claim of heirship, and later commenced other proceedings to the same end, and that in all of such litigation they did ‘all in their power to further the interest of their mother.’ It must, therefore, be assumed that at least as early as March 14, 1912, more than five years before the commencement of this action, they had knowledge of Connolly's representations in the Probate Court, which they now charge to have been false and fraudulent. To overcome the presumption of laches, which they admit arises from the running of the period prescribed by the Idaho Statute, the only explanation they have to offer is that they repeatedly took legal advice in respect to their rights, and up to about the time the suit was commenced they were always informed that they were not the heirs of the deceased. But can such an excuse avail them here? In reason I think the better rule would be to regard the State Statute as absolutely binding in the premises. It is admittedly fair and reasonable, and it would tend to bring discredit upon the administration of the

law, if, by reason of the mere accident of residence, as a consequence of which the plaintiffs are entitled to invoke the jurisdiction of this Court, they could recover in a case where citizens of the State, with like claims, would be debarred from recovering. The statute, it is to be observed, is not limited to actions at law, but applies equally to suits in equity."

In *Pearsall v. Smith*, 149 U. S. 231, the Supreme Court held that the case was a clear one in favor of the bar of the statute of limitations of New York and in affirming the decree of the Circuit Court, had this to say on page 233:

"The Circuit Court held that this suit was one of the class provided for by the terms of Section 382, subdivision 5, and that, if the plaintiff would be barred of his relief in the state court by lapse of time, he would be barred in the federal court also, citing *Burke v. Smith*, 16 Wall. 390, 401; *Clarke v. Boorman's Executors*, 18 Wall. 493, 509; *Wood v. Carpenter*, 101 U. S. 135; 138; *Kirby v. Railroad Co.*, 120 U. S. 130, 138."

In the case of *Redd v. Brun*, 157 Fed., 190, where the statute of limitations of the State of Colorado providing that bills for relief on the ground of fraud shall be filed within three years after the discovery by the aggrieved party of the facts constituting such fraud, the Circuit Court of Appeals of the Eighth Circuit, in affirming the decrees of the lower court, had this to say on pages 194 and 195:

"The burden was upon him in this suit to show some sound reason why he did not make this search and inquiry in less than four years after the means of discovering the fraud were within his reach, and why a court of equity should refuse to apply its doctrine of laches until more than two years after the statutory limitation upon a like action had expired. He did not successfully bear this burden. He failed to establish any reasonable excuse for his postponement of his inquiry and search for more than four years after these deeds had been recorded. If

by a failure to make the search and inquiry after the public record disclosed the means of discovery he could toll the limitation of the statute two years beyond the statutory time, it is not perceived why by a continued failure he might not toll it indefinitely; and as no equitable reason has been shown why the doctrine of laches should not be applied after the expiration of the limitation, the complainant has no standing in equity. He was guilty of laches which bars his suit, and the decrees below must be affirmed."

Judge Ross in the case of *De Estrada v. San Felipe Land & Water Co.*, 46 Fed. 280, where laches and the statute of limitations were raised on demurrer, held that courts of equity are governed by the analogies of statutes of limitations, and in referring to the delay of the plaintiff in not instituting her suit sooner for the protection of her alleged rights said: (Page 283)

"Instead of enforcing she slept upon them for a period nearly three times as long as the statute of limitations prescribed by the state for the recovery of land in an action at law. Under such circumstances a court of equity will remain passive. An order will be entered sustaining the demurrer and dismissing the bill as amended, at complainant's cost."

Citation of cases almost without limit and beyond the patience of any court could be made showing that the bill of complaint of the appellants was properly dismissed, and appellees content themselves in this connection with the quotation of the following extract from the decision of Judge Deitrich, (Pages 72 and 73 of the Record):

"No case has been drawn to my attention which, by reason of a close similarity of facts, tends to support the plaintiffs' contention, and upon the whole it must be held that they have failed to disclose any such unusual facts or extraordinary circumstances as would warrant

this Court in disregarding a fair and reasonable State statute and in thus enabling the plaintiffs to litigate a charge of fraud the facts involved in which they knew more than five years before they took any action."

IMAGINARY TRUST.

Appellants devote much space in their brief to an imaginary trust relationship between the appellee Lawrence F. Connolly, as administrator of the estate of John Corbett, deceased, and themselves, a relationship which never existed and which could not possibly have existed under the allegations of their bill, which do not show Lawrence F. Connolly in any capacity whatever, or John J. Connolly, so far as any rights of the appellants are involved, to be or to have been a trustee of an express or implied or involuntary trust, or trustee at all of the appellants.

"Express trusts are those which are created by the direct and positive acts of the parties, by some writing, or deed, or will; or by words either expressly or impliedly evincing an intention to create a trust."

39 Cyc., page 24.

Vol. III, Words & Phrases, page 2611.

"Implied trusts are those which, without being expressed, are deducible from the nature of the transaction as matters of intent, or which are superinduced upon the transaction by operation of law as matters of equity, independently of the particular intention of the parties."

39 Cyc., page 25.

Vol. III, Words & Phrases, page 2611.

Inasmuch as it is not alleged in the bill that appellants ever had any communication with any of the Connollys or their sister, Mrs. Udell, or that any of the Connollys or their sister, prior to or at the date of the decree of distribution, knew of the existence of the appellants, there is no express trust alleged in the bill and the matter of express trust is eliminated from this case.

Inasmuch as appellants never appeared before the Probate Court of Kootenai County, Idaho, the court which decreed the distribution of the estate of John Corbett, deceased, and never asserted in such probate court any claim as heirs of said deceased, and inasmuch as neither Lawrence F. Connolly, as administrator, or individually, nor John J. Connolly, in any capacity whatever, ever deceived appellants or made any statement or misrepresentation whatever to them or prevented them in any manner or degree from asserting any claim of heirship they might have had in and to said estate, and inasmuch as appellants could not sue Lawrence F. Connolly, as administrator, for any part of such estate, and the Probate Court could not force or compel such administrator, after the making and entry of the decree of distribution to turn over or deliver to said appellants or either of them any part of said estate; therefore, there never existed between appellants or either of them and Lawrence F. Connolly, as administrator, or individually or at all, or John J. Connolly in any capacity, any trust relationship whatever.

Surely, Lawrence F. Connolly as administrator of the Corbett estate could not hold the same in trust for these appellants if, under the laws of the State of Idaho, they could not recover from him as such administrator any part of such estate. One cannot be a trustee of another who does not have under his control some property for which the cestui que trust can maintain an action to recover the possession of the same, and there is no case cited in appellants' brief holding any trust relation between an administrator and an alleged heir where the law of the forum which governs the distribution of the estate has foreclosed the right of recovery by any heir who has not asserted any claim in the administering court or been provided for in

the decree of distribution. The law of Idaho specifically declares that the decree of distribution shall be conclusive upon all heirs unless reversed, set aside or modified on appeal, and that the heirs mentioned in the decree of distribution can sue for and recover their distributive shares from the administrator. Upon the decree of distribution becoming final any trust relation between the administrator and the heir mentioned in such decree ceases. Such administrator is no longer entitled to retain the possession of the property of the heir. The administrator's control and management of the property have ceased and a trust relation cannot exist beyond the time the trustee is legally entitled to the possession of the trust property.

By operation of the laws of Idaho any trust relation that might have existed upon the part of Lawrence F. Connolly, as administrator, ceased by virtue of the decree of distribution, dated the 23rd day of August, 1909, and which became final sixty days thereafter, and no other conclusion can be drawn from said Section 5627, Idaho Revised Codes, and the following language of the decision of the Supreme Court of Idaho interpreting the same, found on page 45 of *Connolly v. Probate Court*, *supra* :

“Said probate court having had jurisdiction of the probating of said estate with the power to determine who were the heirs of said Corbett, deceased, and who were entitled to succeed to his estate, and what their respective interests were, and having determined these matters, and having entered its decree of distribution therein, and the decree not having been appealed from within the time provided by law for an appeal, the decree becomes conclusive as to the rights of all heirs and claimants to said estate.”

But if it should be thought, notwithstanding the fact that

appellants never asserted in the Probate Court any claim as heirs of John Corbett, deceased, that technically there might be some implied trust relationship between Lawrence F. Connolly, as administrator, and these appellants, as alleged heirs up to the time of the entry of the decree of distribution, it must be admitted thereafter that Connolly's trusteeship ceased for the reason that the decree of distribution became conclusive and appellants could not recover from the administrator any part of the estate. Any cause of action they might have had against Lawrence F. Connolly as their trustee accrued prior to the entry of the decree of distribution and the statute of limitations commenced to run immediately upon the entry of such decree. The decree of distribution was a public record and was notice to appellants that the estate had been distributed to Lawrence F. Connolly and his brothers and sister. By pleading their familiarity with the death of John Corbett, as early as the month of May, 1910, and their acquaintance with and support of the litigation initiated in March, 1912, by their mother, Bridget Madden, which involved the decree of distribution and the alleged fraudulent conduct upon the part of Lawrence F. Connolly and his brothers and sister, they have eliminated themselves from any consideration on the claim made in their brief that the statutes of limitations do not apply to suits in equity or to trusts. As hereinbefore pointed out no express trust existed between appellants and any of the Connollys. Even if the suit presented a case of an express trust, the statute of limitations commenced to run upon the date of the decree of distribution, which was the 23rd day of August, 1909, since the decree became conclusive as to rights of heirs and ended the trust control of the administrator, and the property of the estate which had been under his control

therefore immediately became the property of the distributees mentioned in the decree for which, under the laws of Idaho, they could maintain a suit for the recovery of the possession thereof from the administrator. In other words the trust relation then ended under the rule of decision in the case of *Clark v. Boorman's Executors*, 85 U. S. 493, in which the Supreme Court, in referring to an express trust and the application of the statutes of limitation to the acts and conduct of the trustees, on page 509, stated:

"But when he has parted with all control over the property, and has closed up his relation to the trust, and no longer claims or exercises any authority under the trust, the principles which lie at the foundation of all statutes of limitation assert themselves in his favor, and time begins to cover his past transactions with her mantle of repose."

In Paragraph XXI of the bill (Record page 13) it is alleged that Lawrence F. Connolly, as administrator, distributed and delivered said estate to himself and John J. Connolly on the 28th day of June, 1912, and to William Connolly and Ellen Udell on the 3rd day of July, 1912, in the proportions mentioned in the decree of distribution. In other words, all the estate was actually distributed under the decree more than four years and eight months before the commencement of this suit. And by referring to the case of *Connolly v. Probate Court*, mentioned in appellants' bill, and to page 42 thereof, where the Supreme Court of Idaho said:

"On August 13, 1912, the said probate court made an order and decree in said matter finally discharging and releasing said Lawrence F. Connolly as administrator of said estate, and releasing and discharging from all liability his sureties as such administrator."

it will be seen that Lawrence F. Connolly was discharged

as administrator of the estate and the sureties on his bond released and discharged from all liability more than four years and seven months before the commencement of this action and more than a year and seven months after the time had expired under the statute of limitations in which to commence any action on the ground of fraud, even though the bill herein had presented a case of an express trust, for instance, if Lawrence F. Connolly had been acting as the executor under a trust created by will. But, no express trust existing herein, the very most that can be contended for would be an implied trust relation which ended with the decree of distribution which provided for the distribution of all the Corbett estate to Lawrence F. Connolly and his two brothers and sister, Ellen Udell. From that time on he had no further trust connection with the property referred to in the decree and the statute then began to run, and if he had been guilty of any wrong doing, such wrong had been committed prior to the decree and had become a matter of public record.

The Court of Appeals of New York, in passing upon the question as to the time when the statute of limitations commences to run, in *Lamar v. Stoddard*, 9 N. E. 328, said :

“He could, at most, have been declared a trustee *ex maleficio*, or by implication or construction of law ; and in such a case the statute begins to run from the time the wrong was committed by which the party became chargeable as trustee by implication.”

And again the Court of Appeals of New York in *Gilmore v. Ham*, 36 N. E. 826, on page 828, laid down the rule as to when the statute of limitations should run both with respect to express and implied trusts, in the following language :

“In *Lammer v. Stoddard*, 103 N. Y. 672, 9 N. E. 328, we described the doctrine as applicable against a trustee of an actual, express, and subsisting trust, but held that

where the trustee became such by implication or construction the statute ran from the date of the wrong which raised the implication. It may be added that even in the case of a direct trust the statute will begin to run when it ends, and the trustee has no longer a right to hold the fund or property as such, but is bound to pay it over, or transfer it discharged from the trust."

Since dictating the foregoing upon the proposition of the severance of all trust relationship on the part of Lawrence F. Connolly, as administrator, upon the entry of the decree of distribution, and the placing of this brief in the hands of the printer, there has been received by counsel for appellees a copy of the decision rendered in the case of *Cardoner v. Day et al.*, filed January 25, 1918, a suit in which such counsel appeared as one of the solicitors for the defense, and wherein the question was raised as to the right of an administrator to purchase the estate upon which he had been administering from the heir subsequent to the date of the decree of distribution and prior to his discharge as such administrator, in which Judge Dietrich said:

"But upon the entry of a decree of distribution the right of possession in the administrator terminates and his authority relative to the property ceases. Secs. 5626 and 5627. The property distributed is no longer a part of the estate entrusted to the care of the administrator. Touching it, both his rights and his obligations are at an end."

It cannot be contended that this is a case of a continuing trust on the part of Lawrence F. Connolly, as administrator, for the reason that the averments of the bill are to the effect that the decree of distribution was entered in August, 1909, and that the estate was actually distributed by the administrator in the months of June and July, 1912, and that it further

appears from the decision of the Supreme Court of the State of Idaho concluding the litigation in which appellants took such a vital interest, (the decision referred to in their bill of complaint) that Lawrence F. Connolly was discharged and his sureties released on the 13th day of August, 1912, by order and decree of the Probate Court.

Appellants cannot plead ignorance and want of knowledge as to these facts. They were all matters of public record, and furthermore, facts that had been investigated again and again by their attorneys. In addition to their allegations as to the interest which they took and the assistance which they extended to their mother in her protracted litigation, they aver in Paragraph XXXI of their bill (Record page 19) that on the 9th day of December, 1912, nearly four months after the entry of the decree discharging the administrator, and more than four years and three months prior to the commencement of this suit, they consulted one, Arthur Schmidt, an attorney and counsellor of Pittsburg, Pennsylvania, as to their rights in the estate of John Corbett, deceased, and in their behalf said Schmidt took the matter up with Elder & Elder, attorneys at law at Coeur d'Alene, Idaho, who were familiar with all the facts pertinent to the inquiry and who, they allege in Paragraph XXX of their bill, were the attorneys who represented their mother in her litigation.

It is well-nigh impossible to conceive of a case of more specific and detailed information and knowledge having been imparted to a cestui que trust concerning a severed trust relationship and an adverse claim of ownership and ownership and possession on the part of a trustee of property alleged to have been originally held in trust. And they will not be permitted to say after setting in motion these personal agencies for the

acquisition of knowledge and information that it was only just a short time before the commencement of their suit that they acquired knowledge as to the alleged fraudulent acts of the administrator, Lawrence F. Connolly, which alleged fraudulent acts he and his brothers and sister had repeatedly successfully combatted in the courts in litigation with which appellants were familiar and which had received their support.

As stated by the Supreme Court of the United States in *Wood v. Carpenter*, *supra* :

“A general allegation of ignorance at one time and of knowledge at another are of no effect.”
and that

“There must be reasonable diligence; and the means of knowledge are the same thing in effect as knowledge itself.”

And the following language from such decision is respectfully submitted as determining knowledge upon the part of appellants :

“The fraud intended by the section which shall arrest the running of the statute must be one that is secret and concealed, and not one that is patent or known. *Martin, Assignee, etc., v. Smith*, 1 Dill. 85, and the authorities cited.

“‘Whatever is notice enough to excite attention and put the party on his guard and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it.’ *Kennedy v. Greene*, 3 Myl. & K. 722. ‘The presumption is that if the party affected by any fraudulent transaction or management might, with ordinary care and attention, have seasonably detected it, he seasonably had actual knowledge of it.’ *Angell, Lim.*, sect. 187 and note.”

In the case of *Norris v. Haggin*, 136 U. S. 386, which was

appealed to the Supreme Court from the Circuit Court of California, and in which an attempt was made, as in the case at bar, to show want of knowledge of the fraud until advised of the same by counsel a short time before the commencement of the suit, the Supreme Court in sustaining the decree of Judge Sawyer in dismissing the bill took occasion to say, on page 388:

“The bill also alleges that these frauds did not come to his knowledge until a short time before the commencement of this suit, and then only through information derived from his counsel in the case.”

And on page 392:

“Even the principle of a court of equity, that time does not begin to run against a party on whom a fraud has been committed until that fraud has been discovered, can do the plaintiff no good in the present case. That he knew about the fraud, if there was one, in 1869, when he applied to Beatty, who refused to take his case; and that the facts out of which he was bound to know this fraud, if his bill be true, existed, were open, were patent, and could not fail to be discovered by any sort of inquiry or investigation, is so clear that there is no room for the doctrine of his having discovered these facts only a year or two before the suit was brought, or indeed after he had employed counsel.

“It is a part of this general doctrine, that to avoid the lapse of time or statute of limitation, the fraud must have been one which was concealed from the plaintiff by the defendant, or which was of such a character as necessarily implied concealment. Neither of these principles can apply to the defendants in this case. The acts which constituted the fraud as alleged in the bill were open and public acts.”

The following language of the Circuit Court of Appeals of the Eighth Circuit, in *Williamson v. Beardsley*, *supra*, found on page 470, is particularly fitting to this case:

“Discovery as employed in a statute or equitable rule of limitations and knowledge are not convertible terms, nor does the former mean the result of a resort at leisure to known sources of information. The possession of the means of knowledge is equivalent to knowledge itself. A party who has the opportunity of knowing the facts of which he complains cannot avail himself of his inactivity, and thus escape the imputation of laches. The grounds of attack against the validity of the orders of sale and the executor’s deeds were matters of record. They had notice of the pendency of the administration proceedings sufficient to excite their attention and to put them on guard as to the course thereof. Under these circumstances they must be deemed to have had actual knowledge of what the records showed.”

In *Burke v. Smith*, 83 U. S. 390, on page 401, the Court said:

“Had their bill been framed to set aside the arrangement because of fraud, it must have been held to have been filed too late. The statute of limitations bars actions for fraud in Indiana after six years, and equity acts or refuses to act in analogy to the statute. Can a party evade the statute or escape in equity from the rule that the analogy of the statute will be followed by changing the form of his bill? We think not. We think a court of equity will not be moved to set aside a fraudulent transaction at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations, after he had knowledge of the fraud, or after he was put upon inquiry with the means of knowledge accessible to him.”

It is a well established rule of the United States Supreme Court that courts of equity will apply the doctrine of laches and enforce the statutes of limitations in attempts to establish a trust, except where it appears, First,—That the trust is clearly established, and, Secondly,—That the facts have been

fraudulently and successfully concealed by the trustee from the knowledge of the cestui que trust, and such is the holding in the case of *Badger v. Badger*, 69 U. S. 87, 95, where the bill was dismissed, and the following language is quoted from that decision by reason of its particular applicability to the case at bar :

“It is true there is a general allegation, that the ‘fraudulent acts were unknown to complainant till within five years past,’ while the statement of his case shows clearly that he must have known, or could have known, if he had chosen to inquire at any time in the last thirty years of his life, every fact alleged in his bill.”

In the case of *Percy v. Cockrill*, 53 Fed. 872, where the court of appeals of the Eighth Circuit denied a similar contention that time is no bar in equity to a suit for relief from an actual fraud or constructive trust, had this to say on page 875 :

“One of the qualifications of this rule is that the facts constituting the fraud or trust must have been fraudulently and successfully concealed from the injured party. *Badger v. Badger*, 2 Wall. 87, 92. And notice of facts and circumstances which would put a man of ordinary intelligence and prudence on inquiry is, in the eye of the law, equivalent to knowledge of all the facts a reasonably diligent inquiry would disclose. ‘Whatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led. Where a person has sufficient information to lead him to a fact, he shall be deemed conversant with it.’ ”

And further, on page 876, emphasized the rule as to the application of the statute of limitations in the following language :

“Generally courts of equity act, or refuse to act, in

analogy to the statute, and they will not be moved to set aside a fraudulent transaction, or to enforce a constructive trust, at the suit of one who has been quiescent during a period longer than that fixed by the statute of limitations, after the complainant had knowledge of the fraud or trust, or after he was put upon inquiry, with the means of knowledge accessible to him."

And the same court made a similar ruling in *Swift v. Smith*, 79 Fed. 709, where there was involved a three year statute of limitations similar to that of Idaho against actions on account of fraud, and held that, inasmuch as all the facts on which the appellant relied for relief were spread upon the records of the probate court and the register of deeds which were open and ready for inspection, such records were notice to her of all the facts which they disclosed.

There is much irrelevant and unfounded statement in appellants' brief as to Lawrence F. Connolly, administrator, contracting or dealing with himself, and in an individual capacity securing a judgment against himself as an administrator. He did not in any capacity contract with himself or secure any judgment against himself and he did not purchase any property from the estate. The laws of Idaho permit an administrator to inherit property of the estate in which he is acting as such administrator as well as any other heir. The repeated assertions in appellants' brief to the effect that Lawrence F. Connolly and his brothers and sister were not heirs of Corbett, deceased, are incomprehensible, since, as hereinbefore shown, in the very decision of *Connolly v. Probate Court*, supra, referred to in the bill, the Supreme Court of Idaho specifically held that they were cousins and heirs of the deceased, and entitled to succeed to his estate, and issued a peremptory writ of prohibition prohibiting the Pro-

bate Court from interfering with the distribution of the Corbett estate to them. In that case a similar contention was made as in the case at bar. By the averments of their bill and their references therein to the decisions of the Idaho Supreme Court, appellants negative their continuous contention that the Connolly brothers and their sister were not heirs. Even if there had been a showing in this case that Lawrence F. Connolly, in the absence of being an heir, had fraudulently purchased from himself the property of the Corbett estate and the transfer to him had been confirmed by the Probate Court, the transaction would not be void and only voidable in a proper suit commenced within such a time as to avoid the bar of the statute of limitations. The decree of distribution is not a fraudulent judgment or a judgment in favor of Lawrence F. Connolly individually against himself as administrator. It has been held by the Supreme Court of Idaho to be a legal decree and to lawfully distribute the estate to the legal heirs of the deceased, distributees mentioned therein. Every act complained of became a matter of public record and was finished and concluded so as to leave the period of time between the completion thereof and the commencement of this suit, almost twice the length of that prescribed by the state statute of limitations on the ground of fraud.

The case of *Bryan v. Kales*, 134 U. S. 126, cited in appellants' brief is not in point and the facts therein alleged are entirely dissimilar to those herein. Mr. Justice Harlan in his decision specifically pointed out, in reply to the contention that the plaintiff was guilty of laches, that the action was not barred by the statute of limitations of Arizona and had been commenced within the time prescribed by the provisions of such statute.

Nor is *Marshall v. Holmes*, 141 U. S. 589, a case in point.

The cases cited in appellants' brief upon the proposition that federal courts would entertain jurisdiction to set aside judgments of the state courts do not support the contention of appellants herein and are not applicable to the facts appearing upon the face of the bill, as brief reference thereto will fully demonstrate.

In *Barrow v. Hunton*, 99 U. S. 80, the Supreme Court reversed the judgment of the Circuit Court for want of jurisdiction.

On page 35 of appellants' brief the Supreme Court of Idaho, in *Connolly v. Probate Court*, *supra*, is not accurately quoted. There was omitted a very important and qualifying prepositional phrase, to-wit: "without any laches or fault on his part," which should follow the word, "property." This phrase entirely destroys this decision as an authority for appellants' contention. And if the entire paragraph from which this language was taken had been quoted, the following words would have appeared:

"There must be an end to the settlement and distribution of estates of decedents,—an end to such litigation."

Passing to *Hale v. Coffin*, 114 Fed. 567, it will be noted that the Circuit Court dismissed the bill of complaint and held that the claim set up therein was barred by the statute of limitations, citing and approving the rule laid down in *Broderick's Will*, *supra*.

In *Byers v. McAuley*, 149 U. S. 608, the Supreme Court reversed the decree of the Circuit Court and laid down the rule that possession of decedent's property by an administrator appointed by a state court is such a possession as cannot

be disturbed by any other court, and the court does not say, as quoted on page 36 of appellants' brief, that an heir may establish his right to a distributive share of an estate, but that the distributee may establish his right to his share in the estate.

The law of Idaho, as hereinbefore pointed out gives a distributee mentioned in a decree of distribution the right to sue the administrator for his distributive share of such estate.

In *Arrowsmith v. Gleason*, 129 U. S., 86, the facts were in no manner similar to those herein, and the question of the statute of limitations was not therein involved.

In *Rhino v. Emery*, 72 Fed. 382, the court specifically pointed out that the time limit provided in the statutes of limitations had not run, and the inference to be drawn from that decision is to the effect that if the action had been barred by the statute the demurrer would have been sustained.

No statement that counsel for appellees could make in this brief would so apply and conclusively emphasize the fact that the case of *Patterson v. Dickinson*, 193 Fed. 328 is not at all in point, as the language of Judge Gilbert found on page 333 thereof as follows:

"The case differs essentially from *Tracy v. Muir*, 151 Cal. 365, 90 Pac. 832, 121 Am. St. Rep. 117, the *Broderrick Will Case*, 21 Wall. 503, 22 L. Ed. 599, and other similar cases cited on behalf of the appellee, holding that the determination of the question of the genuineness of an instrument purporting to be a will is solely and exclusively for the court to which proof of wills is presented, and that its decision therein is final and conclusive, and not subject, except upon appeal to a higher court, to be questioned in any other court, or to be set aside or vacated by a court of chancery.

"The superior court of Los Angeles county was not vested with jurisdiction primarily to decide whether the instrument which had been admitted to probate in Missouri as the will of Rachael E. Dickinson was what it purported to be. The determination of that question belonged exclusively to the Probate Court of the decedent's domicile. That court having finally adjudicated the question, and having decreed that the instrument was not the last will and testament of the decedent, and that she died intestate, its judgment must be held to be final and conclusive upon any ancillary administration. The will having been set aside by the only court which had jurisdiction to set it aside, the judgment so rendered is by law conclusive of the right of the distributee under the proceedings of the court of ancillary administration to retain the property obtained by virtue thereof."

The case of *Johnson v. Waters*, 111 U. S. 640, did not involve any statute of limitations and the relations of the parties and the facts were entirely different than in the case at bar. That decision is an authority against the appellants as will appear from the following language of the court therein found on page 669:

"Had the question of fraud been before the Probate Court in any of these proceedings, and had the complainant been appraised of them, the case might have been different. This court would not try over again a case already tried, nor permit the complainant to litigate matters which he had notice of, and which he had an opportunity to litigate in the probate proceedings."

The issue with which court was dealing in the case of *Simon v. Southern Railway Company*, 236 U. S. 115, is so entirely foreign to the issue involved herein that the briefest reference thereto shows how entirely inapplicable that case is. The judgment had been secured without any notice to the judgment debtor and in violation of the due process clause of the Four-

teenth Amendment. There was no question as to limitation. The judgment was entered on the 20th of January, 1905, and suit was commenced on February 6, 1905, to enjoin the enforcement of the same.

Judge Dietrich in the case at bar and Judge Morrow in *Goodrich v. Ferris*, supra, have made it so plain and convincing that *Sohler v. Sohler*, 67 Pac. 282, cannot be treated as an authority herein that any extended discussion of the case would be imposing upon the patience of this Honorable Court.

Referring thereto Judge Dietrich, on pages 64 and 65 of the Record, had this to say :

“Counsel cited, as tending to support the plaintiff’s view, *Sohler vs. Sohler* (Cal.), 67 Pac. 282, 285. But that such is not the doctrine of the California courts even under a statute which would seem to strengthen, if it does not add to, the remedial rights of the aggrieved party, reference need only be made to such cases as *Lynch vs. Rooney*, 44 Pac. 565, and *Mulcahey vs. Dow*, 63 Pac. 158, where the conditions and contentions were very similar to those here presented, and the more recent case of *Bacon vs. Bacon*, 89 Pac. 317, where the Supreme Court of California sums up the doctrine prevailing in that State as follows :

“ ‘*Lynch vs. Rooney*, 112 Cal. 282, 44 Pac. 565, was an attempt to review a decree of distribution and declare an involuntary trust, upon a showing that the decree was procured by false or mistaken testimony. The case is one of the class where the fraud or mistake is intrinsic. In such cases no relief can be given. *Pico vs. Cohn*, 91 Cal. 133, 25 Pac. 970, 27 Pac. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; *U. S. vs. Throckmorton*, supra. If the latter part of the opinion in this case was intended to declare that such decrees may not be reviewed for extrinsic fraud in procuring them to be made, it must be considered as overruled by the decision in *Sohler vs. Sohler*, supra. In *Mulcahey vs. Dow*, 131 Cal. 73, 63

Pac. 158, the opinion conceded that a distributee may, in a proper case, be held as an involuntary trustee, but decides that the fraud there shown was not extrinsic or collateral.' And see also, to the same effect, *Goodrich vs. Ferris* (Cal.) 145 Fed. 844."

Judge Morrow, in *Goodrich v. Ferris*, supra, in his discussion of the California cases, where the issues and contentions were similar to those herein, plainly and clearly supports the position taken by Judge Dietrich in dismissing appellants' bill of complaint.

APPELLANTS UNDER NO DISABILITY.

On pages 39 and 40 of their brief appellants have incorporated a copy of Section 4070 of Idaho Revised Codes. Just what bearing this section can have upon the case is not made plain as appellants have not shown themselves to be laboring under any of its provisions.

Subdivision 4 of this section is as follows:

"A married woman, and her husband be a necessary party with her in commencing such action;

"The time for such disability is not a part of the time limited for the commencement of the action."

That subdivision would not constitute any disability to appellants commencing their suit in the State of Idaho, as they could have very plainly shown to this court by quoting a subsequent section of Idaho Revised Codes, to-wit, Section 4093, which removes all disability from married women suing and being sued and is as follows:

"Sec. 4093. A woman may while married sue and be sued in the same manner as if she were single: Provided, That except in actions between husband and wife the husband shall not be chargeable in any manner with the wife's costs or other expenses of suit."

They labored under no statutory disability by reason of

their married relationship from bringing any action they might choose in the State of Idaho, and there is no Federal statute or rule of court which disqualified or disabled them from bringing this suit. They could have commenced it at any time since the date of the decree of distribution in August, 1909, as well as on the 29th day of March, 1917, so far as the question of their marital relations was involved. They cannot plead ignorance of said Section 4093, which has been in full force and effect since the early part of 1903, because at the time of the argument of the motion before the District Court, their counsel's attention was called to such section, as well as to the fact that a federal court of equity would not deny them the right to maintain their suit while married. Had their husbands at any time refused to join with them, under Rule 87 of the Old Federal Equity Rules, up to February 1, 1913, and subsequent thereto under Rule No 70 of the New Federal Equity Rules, they could each have proceeded with their suit by next friend appointed under the provisions of said rules.

See decision of Judge Ross in *Wills v. Pauley*, 51 Fed. 257.

IGNORANCE AND ILLITERACY NO EXCUSE.

In passing upon the allegation of the illiteracy of the appellants, on page 70 of the Record, Judge Dietrich said:

"It is suggested that the plaintiffs are illiterate, but the fact is immaterial, for they did that which a person of the highest intelligence would have done; they sought advice from persons learned in the law."

A similar holding was made by Judge Ross in *De Estrada v. San Felipe Land & Water Co.*, supra, found on page 282, as follows:

"Nor is the fact that complainant is ignorant and unable to read or write of itself sufficient to bring into

action the aid of a court of equity in behalf of a claim and demand otherwise barred by lapse of time. Every one, not under legal disability, must assert his or her rights within the time prescribed by the rules of law or equity, as the case may be."

ABSENCE FROM THE STATE CANNOT AVAIL.

The absence of appellants from the State of Idaho cannot avail and in no manner constitutes an impediment to the commencement of their suit at an earlier date, and this is particularly true in view of their knowledge of the death of Corbett and their familiarity with the litigation commenced by their mother involving the questions of fraud charged herein.

Such an excuse was disposed of in Case of Broderick's Will, *supra*, on page 519, in the following language:

"They do not pretend that the facts of the fraud were shrouded in concealment, but their plea is that they lived in a remote and secluded region, far from means of information, and never heard of Broderick's death, or of the sale of his property, or of any events connected with the settlement of his estate, until many years after these events had transpired. Parties cannot thus, by their seclusion from the means of information, claim exemption from the laws that control human affairs, and set up a right to open up all the transactions of the past. The world must move on, and those who claim an interest in persons or things must be charged with knowledge of their status and condition, and of the vicissitudes to which they are subject. This is the foundation of all judicial proceedings *in rem*.

LEGAL ADVICE RECEIVED BY APPELLANTS DID NOT CONSTITUTE EXCUSE OR IMPEDIMENT.

In disposing of their alleged excuse for not commencing their suit sooner on account of certain legal advice, Judge Dietrich said: (Record pages 68 and 69).

“To overcome the presumption of laches, which they admit arises from the running of the period prescribed by the Idaho Statute, the only explanation they have to offer is that they repeatedly took legal advice in respect to their rights, and up to about the time the suit was commenced they were always informed that they were not the heirs of the deceased. But can such an excuse avail them here? In reason I think the better rule would be to regard the State Statute as absolutely binding in the premises.”

If ignorance of the law or legal advice will toll the running of the statutes of limitations they would no longer be of any force and effect and could be abolished by similar allegations of professional advice as set forth in the present bill. Is it not quite possible that the advice received by appellants from their attorneys other than Mr. Jones was correct, and that he was wrong in his conclusions? It is the contention of appellees that if all the parties including the appellants and their mother had been before the Probate Court, the same decree of distribution would have been entered, and in support of this contention the following language of Judge Dietrich is submitted: (Record pages 61 and 62).

“It is very plain from the diversity of advice given, and from the decisions of the Courts as set forth and explained in the bill, that if all the facts of kinship here exhibited by the bill had been before it, the Probate Court might, with much show of reason, have entered the decree now complained of. Under such conditions we ought not to consider as sufficient, and to entertain for any purpose, a charge of fraud so general and so barren of circumstantial detail.”

The claim of appellants both in their bill and brief that the Supreme Court of Idaho held that Bridget Madden was not an heir of John Corbett, deceased, on account of her alienage is squarely disproven by the language of that court in its

decision referred to in the bill herein, to-wit, Connolly v. Reed, supra, as found on page 36 of such decision:

“At common law aliens could not acquire property by descent. An alien at common law had no inheritable blood, and could not therefore claim through an intestate. (Norris v. Hoyt, 18 Cal. 217; 2 Cyc. 90-95, and notes). It became necessary, if aliens were to be allowed to take property in this state by succession, that the law-making power of the state should alter the common-law rule and declare the policy of the state in relation thereto. The legislature in the exercise of this power enacted sec. 5715, supra, and provided that aliens may take in all cases by succession as citizens, but qualified this provision with reference to non-resident aliens. In case a non-resident foreigner should claim by succession, he must ‘appear and claim succession within five years after the death of the decedent to whom he claims succession.’ The statute is definite and certain as to the date from which the five years begins to run. That date is the date of the death of the decedent.”

An inexcusable and libelous attack has been made upon Lawrence F. Connolly in both the bill and brief of appellants that should receive consideration. It is inexcusable because the subject matter thereof is irrelevant and redundant and should not have been placed in their bill or brief. It is libelous because it is not true, as will appear from Connolly v. Probate Court, supra, and the records investigated by appellants and their counsel, Mr. Caleb Jones. (Record pages 23 and 24.)

Before discussing this attack it should be remembered that the bill is neither verified nor signed by the appellants, and in no manner involves the question of any purchase by Lawrence F. Connolly from Bridget Madden. The subject matter of this attack is found in Paragraph XXIX of the bill on pages 17 and 18 of the Record, where, on information and belief, it is alleged that after the death of John Corbett had be-

come known to appellants and their mother, Lawrence F. Connolly went to Ireland and by false and fraudulent representations as to the value of the estate of John Corbett, deceased, induced Bridget Madden, on or about the 1st day of April, 1911, to make an instrument conveying her interest in said estate to Lawrence F. Connolly.

Where appellants received their information on which to base this charge is not disclosed, but the records which they allege they and their attorney, Mr. Jones, investigated, and the decision of the Supreme Court, referred to in their bill, show that this charge is not true.

First, let the decision of the State Supreme Court speak for itself: (Connolly v. Probate Court, *supra*, on pages 52 and 53.)

“It must be remembered that the record herein discloses that both the State of Idaho and Bridget Madden at all times had due and legal notice of the administration of the Corbett estate by the probate court of Kootenai county, with Lawrence F. Connolly as administrator; that as early as May, 1910, Bridget Madden had actual notice of those proceedings, and that one of her attorneys, in her amended petition, verified by him, alleged her actual notice of the value of the Corbett property on the 9th day of April, 1911, which date was the day preceding the execution of her deed and bill of sale of all her interest in said estate to Lawrence F. Connolly. Thus it appears that Bridget Madden had actual knowledge of the decree of distribution and of the value of said estate. She did not take any action in the probate court of Kootenai county until the 28th day of February, 1912—about two years and six months after the date of said decree of distribution, and more than a year after she had actual knowledge of the distribution of said estate. If the contentions of the respondent’s counsel in this case prevail, a decree of distribution of

the probate court would never become final and would have no final, binding force and effect. Such uncertainty in decrees of probate courts was not intended by the legislature in the enactment of the probate laws of this state."

Even if this were a case involving a cancellation of the deed and bill of sale by Bridget Madden to Lawrence F. Connolly, appellants would not be entitled to a rescission of the same since it appears that Bridget Madden, before the execution thereof was fully advised in the premises and had actual knowledge of the value of the property transferred. By referring to the records, which appellants and their attorney investigated, it will be seen that neither Lawrence F. Connolly nor his brothers nor sister ever heard of Bridget Madden or knew of her existence until some time in the late summer of 1910 and long after the date of the decree of distribution; that in April, 1899, said Connollys and their sister and said John Corbett, for a valuable consideration, entered into a contract whereby it was mutually agreed that at the death of said Corbett all his property should be equally divided among said Connollys and their sister, but in the event of the death of said Lawrence F. Connolly or John J. Connolly or William Connolly prior to that of said John Corbett, then the estate of such deceased Connolly was to be divided equally among John Corbett, the surviving Connollys and said Ellen Udell, and in the event of the death of more than one of said Connollys, then the estates of the deceased Connollys were to be divided equally among the living parties to the contract; that on the 6th day of April, 1911, in Clifton, Ireland, Lawrence F. Connolly had a conversation with one Henry Connolly, an attorney of said Bridget Madden, in which said Henry Connolly informed Lawrence F. Connolly that he had copies of all the proceedings

of the Probate Court in the estate of John Corbett, deceased; that on the evening of April 10, 1911, for a valuable consideration and in pursuance of an offer made to said Lawrence F. Connolly by said Bridget Madden, through her said attorney, Henry Connolly, and her son, Martin Madden, who were authorized by her to act for her in the matter of said offer, (which offer was accepted by said Lawrence F. Connolly,) said Bridget Madden, in the presence of said Lawrence F. Connolly, said Martin Madden and his wife, Margaret Madden, the father and mother of said Margaret Madden, the said attorney, Henry Connolly, and J. J. King, a commissioner of oaths, after being fully advised in the premises and having had each of the terms of a bill of sale and deed explained to her and having stated in the presence of all of them that she understood the same, made and executed a bill of sale and deed to said Lawrence F. Connolly conveying and transferring all her right, title, interest and claim in and to the said estate of John Corbett, deceased, and to the property of said estate, and on the 11th day of April, 1911, delivered said bill of sale and deed to said Lawrence F. Connolly, (which were the same deed and bill of sale mentioned in the above quotation from the decision of the Supreme Court of Idaho) and that neither Bridget Madden, nor any one in her behalf ever commenced any action or proceeding to rescind or cancel said bill of sale or deed, and that neither she, nor any one for or on her behalf ever returned to said Lawrence F. Connolly, or to either of his brothers or sister, or offered to return to them or any of them, the consideration paid her upon the execution of said bill of sale and deed.

On pages 56 and 57 of their brief, under the heading,

"Statutes do not apply until the discovery of the mistake," appellants have cited certain cases on the proposition of mistake which are in no manner or degree in point, and in none of which the statute of limitations was brought in question. They involved controversies between parties connected with the mistake. Appellants cannot bring their alleged mistake under the statute which bars a recovery after three years from the discovery of the fraud or mistake. Lawrence F. Connolly had no connection whatever with the legal advice which they received, and any mistake which their attorneys might have made in advising them is not an issue in this case. The issue herein is the alleged fraudulent conduct of Lawrence F. Connolly. He is not charged with deceiving them or with procuring for them any advice from any attorney or with placing any obstacle whatever in the way of their asserting any claim they might have had to the Corbett estate. They could not sue him for their mistake or for the mistakes of their attorneys; therefore, their mistake cannot be an issue herein and is not such a mistake as contemplated by the statute, and they cannot avoid the statute of limitations by pleading personal ignorance or mistake for which Lawrence F. Connolly was in no way responsible.

The statute says: "An action for relief on the ground of fraud or mistake" must be commenced within three years from "the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

These appellants have no grievance against Lawrence F. Connolly for something he never did or caused to be done. If they are in any manner aggrieved on account of mistaken legal advice and have suffered any damage by reason thereof,

for which they would be entitled to maintain an action, their action is against the attorneys who advised them.

There is some discussion in appellants' brief as to excusing delay where parties remain in the same relative position, but such is not the case at bar. The property of the estate was long ago distributed and in so far as the record shows has passed beyond the control of the appellees. As Judge Dietrich has so aptly said, Lawrence F. Connolly might well act upon the assumption that after being drawn into court three times touching the probity of his conduct and the propriety of his claim to be one of the heirs of the deceased, he would be exempt from further harassment. (Record page 73).

By referring to *Just v. Idaho Canal Co.*, 16 Idaho, 639, cited upon the proposition as to where laches should not apply under certain circumstances, it was not pointed out in appellants' brief that Judge Ailshie in that case made it very plain that the cause of action was not barred by the statute of limitations, and that what the court had to say upon the question of laches had reference to delays that did not amount to a bar of the statute.

In their second assignment of error, (Brief page 10) appellants complain of the refusal of the court to permit their so-called amendment to their bill. The court committed no error in this particular for the reason that the language sought to be inserted into their original bill did not constitute an amendment thereto or strengthen the original allegations thereof.

Paragraph XIX (Record page 12) sought to be amended commences with the statement that Lawrence F. Connolly as

administrator of the Corbett estate filed a petition, etc., in which he made certain representations. It is sought to amend this by stating that he made such representations as administrator of said estate, which is no amendment but merely a cumulative allegation that he did certain things as administrator. He is charged originally with making the representations with the intent to deceive the Probate Court and defraud appellants. They ask to add to this language that the representations were made knowing that the Connollys and their sister were not next of kin or heirs at law. This is not an amendment and is immaterial. The bill does not charge Lawrence F. Connolly with stating to the Probate Court that he or his brothers or sister were next of kin, and it appears in the bill that as cousins of John Corbett, deceased, they were, under the laws of Idaho, his heirs, and that Lawrence F. Connolly could not have known that they were not such heirs.

In no way could the adding of this new language have strengthened the appellants' case; in no way did it show any act or conduct on the part of Lawrence F. Connolly that had not been made a matter of record; in no way did it charge Lawrence F. Connolly with deceiving appellants or preventing them from asserting any claim they might have had to the Corbett estate, and in no way did it furnish an excuse for their delay.

In approaching the end of this brief it might not be inappropriate to direct the attention of appellants to the fact that harsh language and denunciation in their brief are as insufficient to constitute argument as are general charges of fraud to make a cause of action in their bill.

The court of last resort in Idaho has said that the Connolly

brothers and their sister were heirs of John Corbett, deceased, and entitled to succeed to his estate; that they were not guilty of any fraud in connection with the administration thereof; that the proceedings in the Probate Court that resulted in the distribution of said estate to them were legal and were notice to all the world, and it has twice issued its pre-emptory writ of prohibition prohibiting any interference with the decree of distribution which distributed to the Connolly brothers and their sister the Corbett estate.

Under the rule of decision of this Honorable Court and of the Supreme Court of the United States these appellants had notice and knowledge at all times of the probate proceedings, were guilty of laches, and their cause of action is barred by the statutes of limitations; therefore, these appellees respectfully submit that the judgment of the District Court dismissing the bill of complaint of appellants should be affirmed.

Respectfully submitted,

W. F. Deale
.....

Solicitor for Lawrence F. Connolly, administrator and individually, and John J. Connolly, appellees.

Residence and Post Office address, Wallace, Idaho.

Service of the above and foregoing brief admitted, accepted and received and a true copy of said brief received and accepted this *4* day of February, A. D. 1918.

Caleb Jones
.....

Solicitor for Appellants.

003169- 23031

IN THE
**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT.

CELIA DIAMOND AND WILLIAM DIA-
MOND AND BRIDGET McGRAIL AND
JOHN McGRAIL,

Appellants.

vs.

LAWRENCE F. CONNOLLY, ADMINISTRATOR
OF THE ESTATE OF JOHN CORBETT, DE-
CEASED, AND LAWRENCE F. CONNOLLY,
INDIVIDUALLY, JOHN J. CONNOLLY AND
JOHN E. McBURNEY,

Appellees.

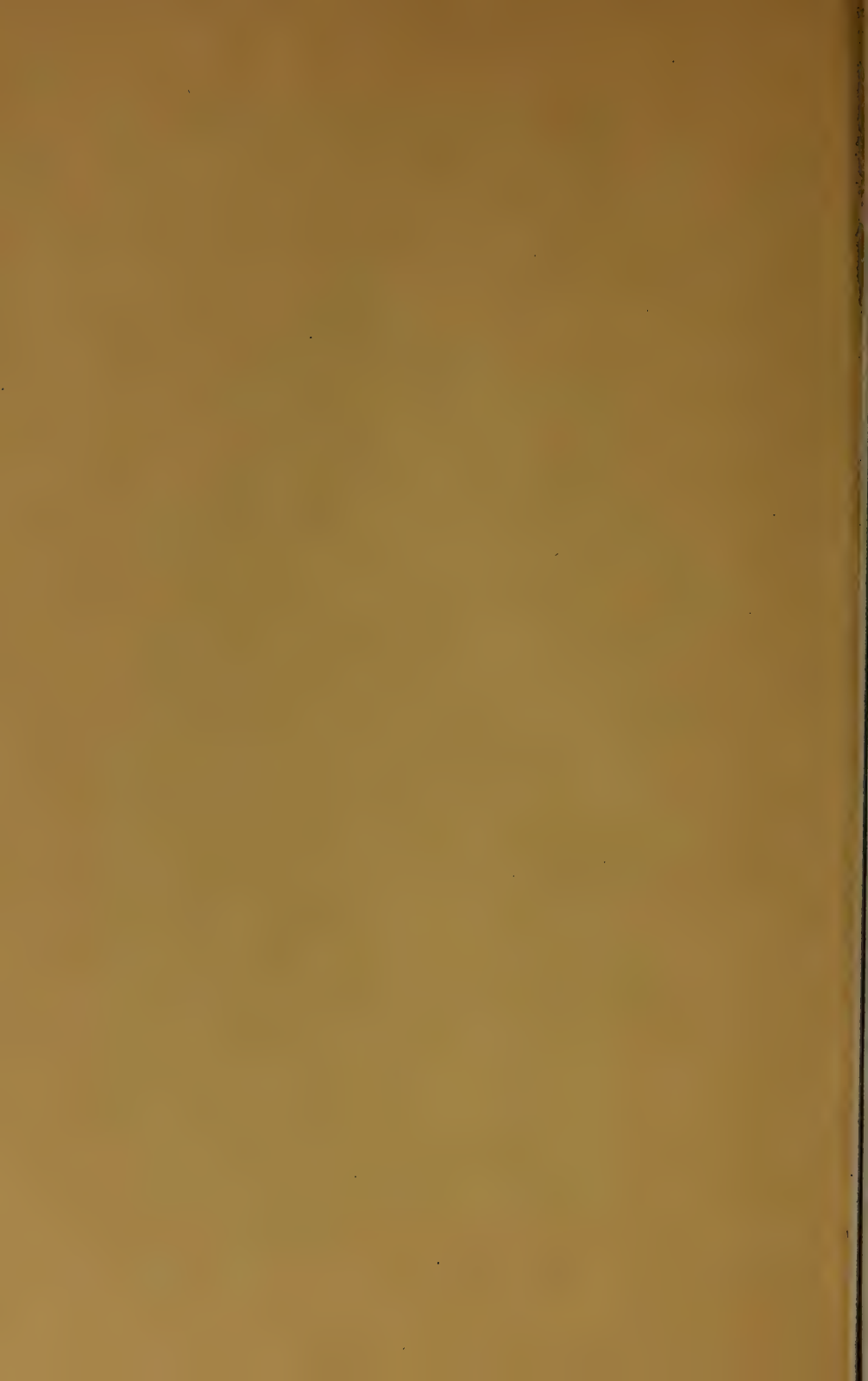
Brief of Appellee, John E. McBurney

EZRA R. WHITLA, *counselor for Appellee.*

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F. D. BOSTON



IN THE
**United States Circuit Court
of Appeals**

FOR THE NINTH CIRCUIT.

CELIA DIAMOND AND WILLIAM DIA-
MOND AND BRIDGET McGRAIL AND
JOHN McGRAIL,

Appellants.

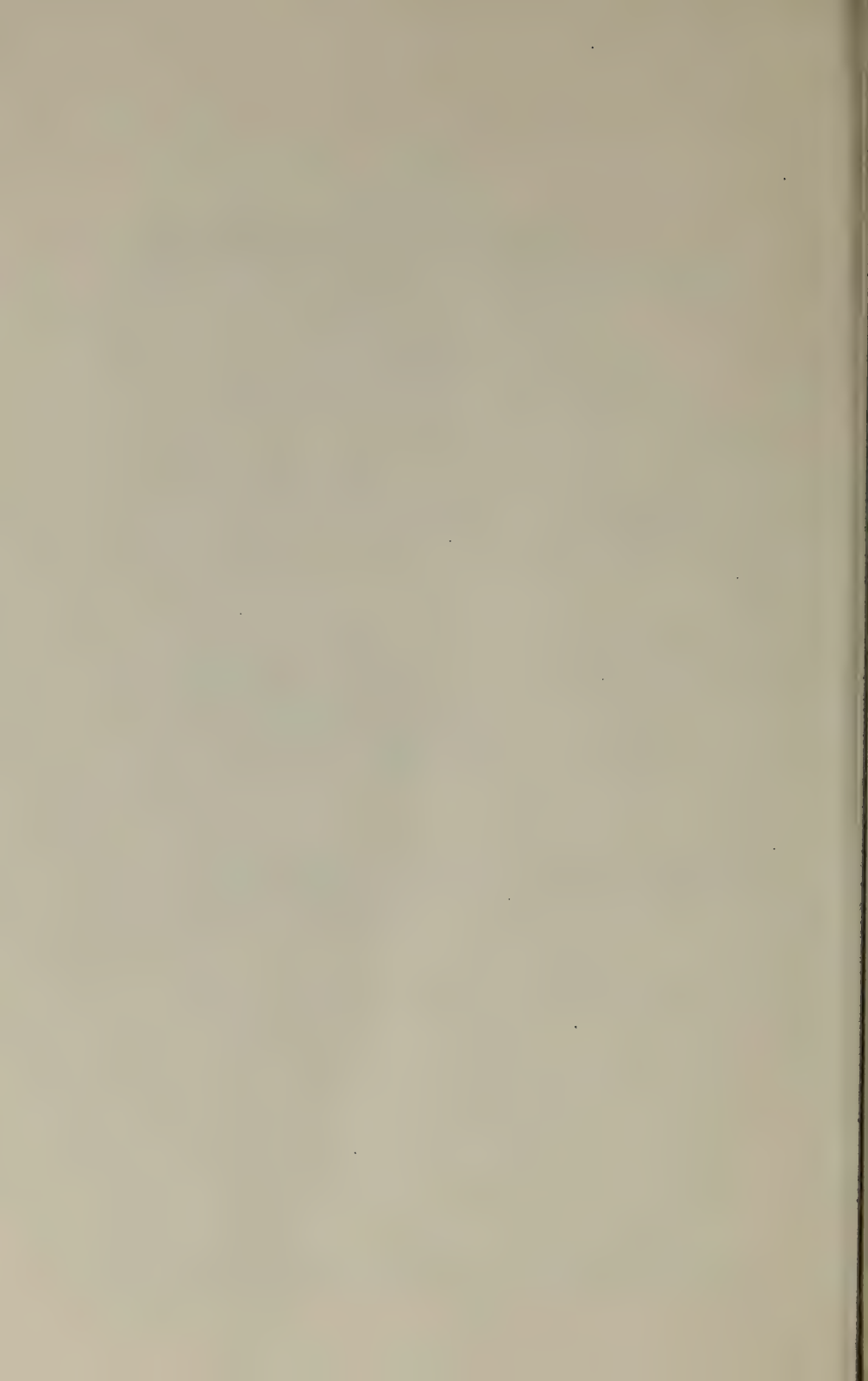
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STATEMENT OF THE CASE.

This is an action prosecuted by the appellants against the defendants, Lawrence F. Connolly and John F. Connolly, and an attempt to hold them under an implied trust claiming that they have received certain property upon the distribution of estate of John Corbett, deceased, which should have gone to the appellants. As to the appellees, the Connollys, it is strictly, purely and wholly an equitable action based

upon the theory of a trust relation and upon a claim by the appellants that because of fraud, practiced by said appellees, that the court of equity will prevent them from reaping the fruits of their alleged fraud by holding them as trustees for the real owners. As to the defendants, John E. McBurney, no allegations, whatever are made of any trust relationship, but as to him, the action is strictly legal, in an attempt to hold him under a written contract as bondsman for Lawrence F. Connolly while acting as administrator of the estate of John Corbett, deceased, he having no interest in the property whatever and not being in any manner connected with the parties and no allegation of any kind whatever being made against him except the single allegation that he was bondsman for the administrator.

To the bill of complaint as filed, the counsel for the appellee, John J. and Lawrence F. Connolly, filed a motion to dismiss.

A motion to dismiss was also filed by the appellee, John E. McBurney, and as the grounds of the motion are numerous and many of them, to-wit, par. 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 19, 20, 21, 23, 25 and 26, of the motion of John E. McBurney, are the same as the same paragraphs of the motion filed by the other appellees, this brief will be presented upon the same grounds only where the right of defense of

John E. McBurney is different from that of the other appellees, leaving it for the counsel for the other appellees to cover the main questions of the case.

The main points made by the appellee John E. McBurney different from those of the other appellees are as follows:

I.

Misjoinder of cause of suit in the bill by bringing a legal action against J. E. McBurney, with a strictly equitable action against the other appellees. (Par. 2, motion of J. E. McBurney, page 49, transcript.)

II.

That no right accrues as against this defendant until an order has been made by the Probate Judge, and the administrator has failed to comply therewith.

(Par. 29, motion of J. E. McBurney, page 54.)

III.

That the bill of complaint shows that Lawrence F. Connolly has complied with all orders of the Probate Court having jurisdiction of the Corbett estate, and that by so doing, the closing of the estate and discharging the administrator relieved this defendant from all liability.

(Paragraph 27 and 30, motion of J. E. McBurney, page 54, 55, transcript.)

IV.

That there is no allegation of any fraud or any equitable action whatever against J. E. McBurney.

V.

That the only liability against J. E. McBurney is a legal action upon a written contract and that all action under said written contract is barred by the Statute limitations of the State of Idaho, particularly sections 4052 of the Code of Civil Procedure of the Revised Codes of State of Idaho, which is as follows, to-wit:

“Section 4052 within five years; an action upon any contract, obligation, or liability, founded upon an instrument in writing.”

VI.

That said action is also barred by the provisions of section 5627 of the Code of Civil procedure, of the Revised Code of the State of Idaho, which provides as follows, to-wit:

“In the order or decree the court must name the persons and the proportions or part to which each shall be entitled, and such persons may demand, and sue for and recover their respective shares from the executor or administrator, or any person having the same in possession. Such order or decree is conclusive as to the rights of *heirs*, legatees or devisees, *subject only to be reversed, set aside, or modified on appeal.*”

ARGUMENT AND AUTHORITIES.

Taking up the above matters in their reverse order, it is our contention that the statutes having explicitly provided in section 5627, before quoted, who can sue for and recover, and giving this right to the parties named in the decree, that this decree is conclusive and that when the administrator complies therewith, the bondsmen are released from all liability as the bondsmen are no guarantors of the correctness of the courts' decision, their obligation only being that the administrator will comply with such orders and account for the estate, and the administrator in this case having done so, and having turned over the property to those persons having a right to sue therefor, the liability of the bondsman thereupon ceased. If the parties who secure this property are not the rightful heirs and the court in some equitable proceeding afterwards should adjudge the holders of the property to be trustees, it would not change the decree nor create any liability under the bond. In this proceeding, no attempt is made to hold McBurney as a trustee but the only attempt is to hold him as a bondsman, and this cannot be done when the administrator has complied with the Probate Court's orders.

THE STATUTE OF LIMITATIONS.

The action against J. E. McBurney is wholly, absolutely and unquestionably legal in its nature. It is as to him, wholly an action upon a written contract, nothing more, nothing less, and upon his obligation under the written contract, the plaintiff's right against him must stand or fall. It is strictly legal in its nature, and being wholly a legal action, he has a right to have it tried in a court of competent jurisdiction and by a jury. As to it, the statute of limitations is a complete bar, and though limitation, in equitable suits are measured on the ground of laches, in legal actions it is an absolute bar, and according to the statutes of Idaho, section 4052, before quoted in full, the limitation on any action on any written contract is five years. The bill refers to the Idaho cases wherein this matter has been litigated and in the case of Connolly vs. Read, 22 Idaho 29, 128 Pac. 213, the opinion shows that on August 25, 1909, the final decree of distribution and settlement was entered. The statute of limitation as to all matters concerned in said estate as to the bondsman of the administrator, then commenced to run. This action was not filed until March 29, 1917, and at that time, the action was barred as to J. E. McBurney.

Again, before such an action can be maintained, there must be some order of some court directing the

administrator to pay the money or turn over the property, and a failure on his part so to do, before any liability attaches on the bond; 18 Cyc. 1261, 1280 subdivision B, 1284 subdivision 7:

“By the weight of authority, there must be not only a final settlement, but also an order of the court directing the payment to be made, and a failure to comply therewith before an action on the bond can be brought by a distributee, a legatee, a person entitled to an allowance for support, or a creditor, for the non-payment of his claim.”

18 Cyc. 1284 (Supra).

Loop vs. Northrup, et al, 13 N. Y. S. 144;

Nickols vs. Stanley, et al, 81 Pac. 117;

Scharman vs. Scoewl, et al, 56 N. Y. S. 498;

Metz vs. People, 40 N. W. 51;

Garvey vs. U. S. F. & G. Co., 79 N. Y. 337.

The United States Supreme Court in passing upon this question says:

“There must be a decree ordering payment, and on which process to collect can issue against the principal;

Alexander vs. Bryan, 110 U. S. 414.

EQUITABLE SUITS AND ACTIONS AT LAW SEPARATE IN FEDERAL COURT.

In this proceeding it is our contention that the attempt to commingle in the equitable action against the appellees, the Connollys, a purely and legal action

against the appellee, John E. McBurney, is without any precedent. It is a fundamental principle of the Federal Equitable jurisdiction that equity and law are separate and distinct.

“Yet although a great number of the states of the American Union, and even England itself has fused together the two systems, in the courts of the United States, while the same judges have jurisdiction in each, the common law and equity are still as distinct as they were in the time of Coke and Bacon.”

Foster's Federal Practice, 2nd. Ed. par. 4.

“The distinction between law and equity in the Federal Courts is made in the constitution itself, and naturally the jurisdiction in equity which the framers of the Constitution had in mind was that jurisdiction as it prevailed at the time when the constitution was adopted.”

“Hughes Federal Procedure, page 378.”

“So marked is the distinction between the jurisdiction of the Courts of the United States in equity, and at law, with respect to procedure, that blending together in one suit in a Federal Court of essentially legal, and equitable remedies cannot be authorized or justified by any state statute or practice on the subject, (citing cases). An allowance of such blending would result in a confusion of procedure not contemplated in the Federal Constitution, or judiciary act, and would be calculated to embarrass the administration of justice.”

Jones vs. Mutual Fidelity Co., 123 Fed. 506,
page 518

The United States Supreme Court has also passed directly upon this question, stated as follows:

“The Federal Court has no jurisdiction of a suit in Equity in which a claim only cognizable at law is united with a claim for equitable relief.”

Scott vs. Neely, 140 U. S. 358.

These rules are applicable with their full force and effect for here the complainants are attempting to commingle with the purely equitable suit brought against the appellees, Connollys, a purely legal action against the appellee, McBurney, when the appellee, McBurney, is not in any manner interested in the equitable action against the Connollys.

In this case, there is no attempt being made to set aside, modify, or vacate the decree of the Probate court. The pleadings do not establish a case attempting to hold Lawrence Connolly as administrator. The brief states specifically that they are attempting to hold both Lawrence Connolly, and John J. Connolly as trustees. (Page 61 appellants brief and closing par. page 74.) Under the claim now made by the appellant, it would make no difference whether Lawrence Connolly had been administrator or not, if he had made the misrepresentation claimed of, and secured the property wrongfully, he could have been held as trustee for the true heirs under appellant's contention, and the fact that he was at one time administrator would neither increase or diminish the legal obligation.

“Where an undertaking was filed in the suit to release the property from the lien, the complainant may take a personal decree only against the defendant, and may bring an action at law against the sureties of the undertaking.”

Phillips vs. Gilbert, 101 U. S. 514.

As to the other points in the case we respectfully submit to this Honorable Court the opinion by the learned District Judge, appearing page 57-73 of the Transcript. The opinion so thoroughly covers the law applicable to the other points that writing a brief would be useless and an encumbrance to the court.

In submitting the case to the court we respectfully submit that in addition to the authorities cited, and the ground laid down by the learned District Judge in sustaining the motions to dismiss the bill that—as to the defendant, J. E. McBurney—there was:

1st. A misjoinder of parties by commingling a suit in equity against the appellees, the Connollys, with a legal action against the appellee, McBurney.

2nd. That no legal right of action would accrue as against the appellee, McBurney, until the administrator had failed to comply with some order of the court.

3rd. That Lawrence F. Connolly, as administrator, having complied with all orders of the probate court having jurisdiction of the Corbett estate,

and his acts having been approved and he having been discharged as administrator, that no action lies against his bondsman until the probate court's decision is vacated, annulled or set aside.

4th. That the action against J. E. McBurney, being a legal action and upon a written contract, is completely barred by the statute of limitations of the State of Idaho which limits the commencement of any action upon a written contract of action, founded upon an instrument in writing of five years.

We therefore pray an affirmative of the order and judgment complained of dismissing the action.

Respectfully submitted,

EZRA R. WHITLA,

Solicitor for Appellee, J. E.
McBurney.

